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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA AND
BENJAMIN R. CIVILETTI, ATTORNEY GENERAL
OF THE UNITED STATES, APPELLANTS

v.

STATE OF MISSISSIPPI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion (App. A, *infra*, 1a-35a) and judgment (App. B, *infra*, 36a-37a) of the District Court for the District of Columbia (Civ. No. 78-1425) are unreported.

JURISDICTION

The three-judge district court, convened pursuant to Section 5 of the Voting Rights Act of 1965, 42

U.S.C. 1973c and 28 U.S.C. 2284, issued its declaratory judgment on June 1, 1979. The United States filed its notice of appeal (App. C, *infra*, 38a-39a) on June 13, 1979. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c. *Beer* v. *United States*, 425 U.S. 130 (1976); *City of Richmond* v. *United States*, 422 U.S. 358 (1975).

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or

> procedure may be enforced without such proceeding if [it] * * * has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission [.] * * * Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

QUESTIONS PRESENTED

1. Whether the State of Mississippi sustained its burden of proving that its legislative reapportionment plan of 1978 does not effect a retrogression in the access of black voters to the electoral process and in the ability of black voters to cast an effective vote for representatives of their choice.

2. Whether the State of Mississippi sustained its burden of proving that its legislative reapportionment plan does not purposefully dilute the voting strength of black voters, abridging their opportunities to participate in the electoral process and to elect representatives of their choice.

STATEMENT

A. Background

The State of Mississippi has a quadrennially elected bicameral legislature consisting of a Senate with 52 seats and a House of Representatives with 122 seats (App. A, *infra*, 12a, Finding No. 30).

According to the 1970 census, blacks in Mississippi comprise 36.8% of the total population of the State, and 31.5% of the State's voting age population (*ibid.*, Finding No. 32). Between Reconstruction and the 1975 elections, only one black served in the legislature. In the present legislature, elected under a temporary court-ordered plan in 1975, four seats in the House and none in the Senate are occupied by blacks (*id.* at 3a and 14a, Findings Nos. 4 and 39).

Legislative reapportionment in Mississippi has been the subject of litigation in the federal courts since 1965, and the matter has been before this Court in one form or another on six occasions. See *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); and *Connor* v. *Coleman*, No. 78-1013 (orders of March 26 and May 21, 1979). Between 1965 and 1979, neither the legislature nor the three-judge court in Mississippi (hereinafter, "the *Connor* court") was able to formulate a permanent plan for apportioning the state legislature that could pass muster under both Section 5 of the Voting Rights Act and the Constitution.

The history of the present action begins in June 1975. There was a brief hiatus, just prior to the 1975 quadrennial elections, when no apportionment plan was in effect, the Attorney General having interposed an objection to the legislature's most recent effort. At this time, the United States was permitted to

intervene as plaintiff in the *Connor* litigation to participate in the proceedings leading to adoption of a plan for the 1975 elections. See *Connor* v. *Finch*, 431 U.S. 407, 412 & n.8 (1977). The *Connor* court then adopted a plan "that was substantially similar to both the 1971 court-ordered plan previously vacated by this Court and the 1975 legislative plan challenged by the Attorney General" (*Connor* v. *Coleman*, No. 78-1013 (Mar. 26, 1979) (Marshall, J., dissenting)). It relied heavily on the use of multimember districts (*ibid.*). This was the plan under which the last elections (prior to the instant action) were held. No appeal was taken from the 1975 court-ordered plan, but the district court "professed its intent to avoid unnecessary delay in preparing a permanent plan for the 1979 state elections" (*ibid.*), and promised, in its order of July 8, 1975, dealing with the temporary plan for elections of that year, to order special elections, under the permanent plan, where the 1975 plan could be shown to have caused irreparable injury. See *Connor* v. *Finch*, 419 F. Supp. 1089, 1114 (S.D. Miss. 1976), modifying 419 F. Supp. 1072, rev'd, 431 U.S. 407 (1977).

In 1976, after some delay (see *Connor* v. *Coleman*, 425 U.S. 675 (1976)), the *Connor* court entered a plan for the 1979 elections, ordering special elections in two districts; but that plan was invalidated on direct appeal to this Court. *Connor* v. *Finch*, 431 U.S. 407 (1977). The basis for this Court's reversal of the 1976 plan was its failure to meet one-person-one-vote requirements. This Court did, however, dis-

cuss the private plaintiffs' and United States' challenges to several of the districts based upon claims of unlawful dilution of black voting strength (*id.* at 421-425), and noted (*id.* at 425) that "[t]he District Court could have avoided this [dilution] charge by more carefully abiding by its stated intent of adopting reasonably contiguous and compact districts, and by fully explaining any departures from that goal." This Court remanded the matter to the three-judge Mississippi court, urging (*id.* at 425-426) (footnote omitted) that in drawing still another plan, the district court

> make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges. In view of the serious questions raised concerning the purpose and effect of the present decree's unusually shaped legislative districts in areas with concentrations of Negro population, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished.

B. The Reapportionment Plans of 1977-1978

As a result of this Court's decision in *Connor* v. *Finch, supra*, there was again a hiatus: in the summer of 1977, Mississippi had no apportionment plan, court-ordered or legislated, to govern the 1979 elections. The hiatus could be filled by a legislative reap-

portionment plan, duly cleared by either the Attorney General or the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act of 1965, by the first week of June 1979. Barring successful passage and clearance of such a plan by that date, the gap would have to be filled by a new and valid court-ordered plan.

In August 1977, the *Connor* court ordered all parties to submit proposed plans adhering to the guidelines set by this Court in *Connor* v. *Finch*, *supra*, 431 U.S. 407. (See App. A, *infra*, 4a, Finding No. 7.) In the Mississippi legislature, a Special Joint Committee on Reapportionment convened, elected a chairman, employed experts, and commenced to formulate plans to be submitted both to the *Connor* court and to the legislature. The Committee's first efforts (September 1977 to early December), which included public hearings, produced plans based upon census enumeration districts ("EDs"). Because the *Connor* court preferred plans based upon voting precincts, the Committee and its experts converted both sets of plans to reflect precinct lines. Early in March 1978, the State tendered its precinct plan to the *Connor* court, and later the same month, the legislature passed a similar precinct plan ("the Statutory Plan") (App. A, *infra*, 4a-8a, Findings Nos. 8-18, 22-23; Affidavit of William A. Allain, Ex. A to [Plaintiffs'] Memorandum in Support of Motion for an Expedited Hearing on the Merits). Meanwhile, in addition to the State's ED Plan (D.-I. Exs. 7-11) and the State Precinct Plan (D.-I. Ex. 4), four other plans were placed before the *Connor* court: the

Plaintiffs' Plan (D.-I. Exs. 42, 44, and as revised, D.-I. Ex. 3); the ED Plan (D. Exs. 3 and 3A) and Precinct Plan submitted by the United States (D. Exs. 4 and 5); and, finally, the Plan of the Special Master (see Allain Affidavit, *supra*, at 12).

On June 1, 1978, the State of Mississippi submitted its Statutory Plan to the Attorney General for Section 5 clearance (App. A, *infra*, 9a, Finding No. 25.) The *Connor* court, meanwhile, directed the parties to confer and arrive at a plan that could be incorporated in a consent decree (*id.* at 8a-9a, Finding No. 24).

On July 31, 1978, the Assistant Attorney General for the Civil Rights Division, as the delegate of the Attorney General, interposed an objection, under Section 5, to Mississippi's Statutory Plan. The State promptly filed this suit in the United States District Court for the District of Columbia (*id.* at 9a-10a, Findings Nos. 25-26) and, on August 2, 1978, moved the *Connor* court to stay its hand and not order a plan into effect until the Section 5 proceeding had run its course (*Connor* v. *Coleman*, No. 78-1013 (Mar. 26, 1979) (Marshall, J., dissenting)). Negotiations toward a *Connor* settlement proceeded, however. At the end of August 1978, the legislature, by informal poll, assented to submission of a plan, which had been agreed to by the parties and recommended by the Joint Committee, as a fall-back in the event the Statutory Plan failed to receive clearance from the district court in the District of Columbia

(*id.* at 9a, Finding No. 24). Soon after this, however, negotiations broke down "when the State insisted that the parties agree not to introduce the settlement plan as evidence before the D.C. court" (*Connor* v. *Coleman*, No. 78-1013 (Mar. 26, 1979) (Marshall, J., dissenting)). As of mid-September 1978, therefore, there was still no reapportionment plan in effect.

In October 1978, after the present case had been tried but before it was decided, the *Connor* plaintiffs asked the Mississippi court to enter a final judgment. When, in November 1978 and January 1979, that court indicated that it would enter no judgment until it became urgent because of imminent elections, the *Connor* plaintiffs, supported by the United States, sought this Court's leave to petition for a writ of mandamus. This Court granted leave to file the petition, but postponed action on it for 30 days, instructing the *Connor* court to enter a plan "forthwith" (*Connor* v. *Coleman*, *supra*). Accordingly, on April 13, 1979, the Mississippi court entered a final judgment that is, in all material respects, the plan earlier agreed to by the parties (App. A, *infra*, 11a, Finding No. 29 & n.1; *Connor* v. *Finch*, 469 F. Supp. 693 (S.D. Miss. 1979)).[1]

The present action for Section 5 clearance of the Statutory Plan, filed August 1, 1978, was heard on

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[1] This Court subsequently denied the petition for a writ of mandamus, noting *inter alia* that "[t]he Clerk [of the district court] has * * * stated that all parties to the litigation have announced in open court that there will be no appeal [from the April 13, 1979 judgment]." *Connor* v. *Finch*, No. 78-1013 (May 21, 1979).

an expedited basis between September 18 and September 27, 1978 (App. A, *infra*, 1a). On the first day of trial, the motion of ten black citizens and registered voters of the State of Mississippi to intervene as defendants was granted (*id.* at 10a, Finding No. 27). On June 1, 1979, the United States District Court for the District of Columbia filed Findings of Fact and Conclusions of Law (App. A, *infra*) and entered a judgment declaring that Mississippi's statutory reapportionment plan has neither the purpose nor the effect of denying or abridging the right to vote on account of race (App. B, *infra*, 37a). The defendant-intervenors made a timely application to the district court for a stay of the judgment pending appeal. When that application was denied, they applied to this Court, supported by the United States (No. A-1067).[2] The United States filed its notice of appeal on June 13, 1979 (App. C, *infra*, 38a-39a).[3] This Court denied the application for a stay on June 18, 1979.

C. The District Court's Opinion

The district court found that the experts who initially drafted the Statutory Plan had been instructed, *inter alia*, to avoid diluting black voting strength. This instruction was implemented principally by

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[2] The effect of a stay would have been the holding of elections under the *Connor* final judgment plan. The last day to qualify for the 1979 primary elections was Friday, June 8, 1979, less than a week after judgment in the present case.

[3] The defendant-intervenors filed their notice of appeal on June 6, 1979.

using north-south rather than east-west dividing lines in the western portion of the State, thereby avoiding the combination of heavily black counties with predominantly white counties to the east. Adjustments were subsequently introduced by the Joint Committee to avoid placing two incumbents in a single district ("dual incumbencies") (App. A, *infra*, 5a-6a, Findings Nos. 12-15). The resulting plan provides 36 districts that have a voting age population ("VAP") in which blacks are a majority—26 House districts and 10 Senate districts (*id.* at 17a, Finding No. 46 (Table)). The court found, however, that in order for blacks to have a reasonable opportunity to elect representatives of their choice, a district should in most instances have a black VAP of 60% or a black total population of 65%. Although formal barriers to voting no longer exist in Mississippi, the present effects of past discrimination are reflected in low black registration and turnout that, together with majority primaries and racial bloc voting, make it unlikely that blacks have a realistic opportunity to elect representatives of their choice in districts having less than this percentage of black voters (*id.* at 12a-14a, Findings Nos. 31-39). The Statutory Plan has 16 districts with black VAP majorities of 60% or more, 14 for the House and two for the Senate (*id.* at 15a, 16a, 26a-27a, Findings Nos. 44, 46 and 49).

This Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976), the district court acknowledged, sets forth a two-part test for the racially discriminatory effect prohibited by Section 5: Whether the plan would

lead to a retrogression in the position of racial minorities, or whether it unconstitutionally dilutes black voting strength (App. A, *infra*, 29a, 31a, Conclusions Nos. 10 and 16). Unconstitutional dilution exists when "heavy black population concentrations are unnecessarily fragmented and dispersed," and when black populations are combined in heavily white districts in a manner calculated to deny blacks an opportunity to elect candidates of their choice (*id.* at 30a, Conclusion No. 14). In a declaratory judgment action under Section 5, the Court held, the burden of proof is on the State (*id.* at 29a, Conclusion No. 9).

For purposes of measuring retrogression, the district court held (*id.* at 31a-32a, Conclusion No. 19), "[t]he settlement plan, adopted by the *Connor* Court an April 13, 1979, must now be considered the preexisting plan and the benchmark with which to compare the statutory plan." The Settlement Plan has three more black VAP majority districts than the Statutory Plan—two for the House and one for the Senate (*id.* at 16a-17a, 26a-27a, Findings Nos. 46 and 49). None of these three has a black VAP majority of 60% or more; indeed, both plans have the same number of districts with 60% or more black VAP majorities (*ibid.*). Even if all the districts urged upon the court by the defendant and defendant-intervenors were adopted, it would not effect a change in the net number of 60% black VAP districts (see *id.* at 18a-26a, Finding No. 47). Despite evidence pointed out by the United States and the defendant-intervenors indicating that concentrations of active

black voters in two districts in the Settlement Plan with black VAP majorities of less than 60% would give blacks in those districts a realistic opportunity to elect representatives of their choice, notwithstanding that the black VAP majority was less than 60% (see page 17, *infra*), the district court concluded that the differences between the two plans are "insubstantial" (App. A, *infra*, 26a-27a, Finding No. 49) and "insignificant" (*id.* at 32a, Conclusion No. 20). "This conclusion to disregard insignificant differences," the court held, "is further supported by the fact that legislative reapportionment is the preferred vehicle for reapportionment * * *" (*id.* at 32a-33a, citing *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978)).

The district court further held that apparently dilutive configurations pointed out by the defendant and defendant-intervenors have been explained and justified by neutral considerations governing reapportionment, such as compactness, unwillingness to divide a city too deeply, or adherence to uniform use (in most of the state) of east-west lines (App. A, *infra*, 18a-26a, Finding No. 47). Had representatives of the black community called attention to the alterations they wished to have made in these districts prior to December 1977, the court found, the Joint Committee, which had been responsive to suggestions submitted at the public hearings, would probably have made the requested changes (*ibid.* and *id.* at 8a, Finding No. 21). No evidence was presented that suggests a discriminatory purpose on the part of the "principal actors in the development of S.B. 3098 and H.R. 1491" (*id.* at 33a, Conclusion No. 22).

Thus, the court concluded that the plans can not be unconstitutional and that they do not reflect the discriminatory purpose prohibited by Section 5.

The district court accordingly granted the State of Mississippi a judgment declaring that its Statutory Plan met the requirements for clearance under Section 5 of the Voting Rights Act of 1965.

THE QUESTIONS ARE SUBSTANTIAL

1. The district court erred in adopting the most restrictive possible reading of the "retrogression" principle of *Beer* v. *United States*, 425 U.S. 130 (1976), thus depriving black Mississippi voters of much of the protection promised by Section 5 of the Voting Rights Act of 1965. That restrictive reading led the court to hold that there were no material differences between the Settlement Plan and the Statutory Plan as long as they contained the same number of legislative (*i.e.*, House or Senate) districts with black VAP majorities of 60% or more. All differences between the two plans, regardless of their actual impact upon the ability of blacks to elect representatives of their choice, were ignored or dismissed by the district court as "insignificant" or "insubstantial."

There are eight districts in dispute, five in the House and three in the Senate. All eight are in the western and central portions of the State where blacks are most heavily concentrated. The retrogression that we contend was introduced by the Statutory plan, relative to the Settlement Plan, falls into four categories: (1) The Settlement Plan provides

for black VAP majority House districts in Warren and rural Hinds counties, while the Statutory Plan does not; (2) the Settlement Plan creates a House district with more than 60% black VAP in Marshall County, while the Statutory Plan does not; (3) the House districts created by the Statutory Plan for Leflore and Adams counties, and one of the Senate districts for Hinds County provided in that plan, although containing 60% or more black VAP, are lower in black VAP percentages, less logical, and politically less viable for blacks than their counterparts in the Settlement Plan; and (4) the Senate districts created by the Statutory Plan for two additional groups of counties, although statistically almost indistinguishable from their counterparts in the Settlement Plan, are in fact far more dilutive than those counterparts because they represent illogical and unnecessary fragmentations of concentrations of black activism and voting strength.[4]

(a) There is no legal basis for the district court's conclusion that the loss of two black VAP majority House districts is insubstantial and not retrogres-

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[4] The areas referred to above are, respectively, a three-county group—Washington, Sharkey, and Issaquena counties —and a six-county area consisting of Humphreys, Holmes, Madison, Yazoo, Attala, and Leake counties. The districts for which we contend are Settlement Plan Senate District No. 14 in Washington County (P. Ex. 35, p. 4, and D.-I. Ex. 33 (map)) and Settlement Plan Senate District No. 23 for Holmes, Humphreys, and Yazoo Counties (P. Ex. 35, p. 5 and D.-I. Ex. 31 (map)).

sive.[5] The court adopted the view of an expert witness testifying for the United States that, as a general rule, given polarized racial bloc voting, blacks have a 50-50 chance of electing a representative of their choice only if they constitute 65% of the population and 60% of the voting age population in the district (App. A, *infra*, 13a). Because the Settlement Plan's House districts for Warren and Hinds counties would have black VAPS of 56.22% and 59.02% respectively,[6] the court concluded that the Statutory Plan, which has no majority black House districts in those counties, represents no retrogression.[7] This excessively rigid application of the 60%

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[5] The court's finding that there is a difference of three black VAP majority districts is based upon a tabular comparison of the Settlement and Statutory plans appearing in the post-trial brief of the defendant-intervenors and incorporated in Finding No. 46 (App. A, *infra*, 17a), showing *inter alia* that the Statutory Plan has 10 black VAP majority Senate districts, and the Settlement Plan (P. Ex. 35), 11. A closer examination of the Settlement Plan shows that it frequently lists only population, not VAP figures. For the tabulation, the Kemper-Lauderdale-Noxubee Senate District No. 20 in the Settlement Plan was apparently assumed to have a black VAP majority because it has a black population of 56.08%. The almost identical district, Senate District No. 32 in the Statutory Plan, however, shows (P. Exs. 1 and 4A) a black population of 56.39%, but a black VAP of 49.27%. The argument in this Jurisdictional Statement, therefore, is based on the premise that the Statutory Plan has two, not three, fewer black VAP majority districts, both in the House: Warren County and rural Hinds County.

[6] P. Ex. 35, pp. 18 and 20.

[7] App. A, *infra*, 19a, Finding No. 47(a) (Warren Co.). The court made no such specific finding as to the rural Hinds County House district, although the logic would appear to

"breakpoint" ignores both mathematical and political realities.

With a majority of the voting age population, blacks have, if not a 50-50 chance, at least some possibility of electing a candidate of their choice; with less than half the vote, they have none. Many factors besides numbers, moreover, bear upon the possibilities of affecting the electoral process. Dr. Loewen, the government's expert, indicated that these factors include, *e.g.*, incumbency, strength of campaign organization, and the qualifications of individual candidates (Tr. 1410-1411). Witnesses also testified that blacks have some chance to elect representatives of their choice in the Settlement Plan's House districts in both Warren and Hinds Counties. The Warren County district includes the activist community of Vicksburg, which has recently succeeded in electing a black to the City Council (Tr. 907-908). The Hinds County district would include two predominantly black towns, Bolton and Edwards, both of which now have predominantly black city governments (*id.* at 835-837).

Our submission, moreover, is consistent with this Court's approach in *Beer* v. *United States*, 425 U.S.

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apply equally to both. Instead, the court found (*id.* at 20a, Finding No. 47(b)) that the drafters of the Statutory Plan deleted the rural Hinds County black district at the request of Representative Buckley, a black legislator. This is simply erroneous. The drafters reduced the number of black majority House districts in the City of Jackson at the request of Mr. Buckley, who believed that five such districts diluted the black vote by spreading it too thinly (Tr. 205-206).

130 (1976). In that case, the Court recognized (*id.* at 142) that only a VAP majority gave blacks a genuine likelihood of electing a city councilman of their choice, but still acknowledged as ameliorative both the increase from one to two black *population* majority districts and the increase from zero to one district with a black VAP majority. It follows that if the next plan deleted even the population majority district, it would be retrogressive. By analogy, in the present case, loss of a black VAP majority district (though not one reaching 60%) constitutes retrogression.

(b) The district court's notion that a small degree of retrogression, *i.e.*, loss of two majority black VAP districts, should be disregarded out of deference to the legislature's paramount role in apportionment matters (App. A, *infra*, 32a-33a, Conclusion No. 20) is equally without basis in law. That conclusion is apparently based upon this Court's reaffirmation, in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), of the proposition that a valid statutory reapportionment plan will always supersede a court-ordered plan. Nothing in *Wise* v. *Lipscomb*, however, equates a preference for legislative reapportionment with according a statutory plan a presumption of validity in a Section 5 proceeding.

The Voting Rights Act of 1965 was intended to prevent covered states from diminishing, even in a small way, the opportunities for blacks to participate in the political process. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969). In order to

obtain a declaratory judgment under Section 5, the plaintiff jurisdiction bears the burden of proof that the plan does not have the prohibited effect. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966); *City of Petersburg* v. *United States*, 354 F. Supp. 1021, 1027-1028 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973).[8] The district court in this case, while formally acknowledging that the burden of proof was the plaintiff's (App. A, *infra*, 29a, Conclusion No. 9), shifted the effective burden of proof to the defendants: having decided to accord the Statutory Plan a presumption of validity, the court then held that the defendants had failed to show it was retrogressive enough to be disapproved under Section 5. Taken to its logical extreme, the district court's theory of insubstantial retrogression could lead to a gradual erosion of the gains blacks have achieved since 1965 in acquiring access to the political process.

(c) The district court erred as a matter of law in failing to recognize retrogression with respect to the six additional disputed districts. It seems fair to say that, for purposes of its retrogression analysis, the court considered the number of 60% black VAP dis-

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[8] In *City of Petersburg, supra*, 354 F. Supp. at 1028, the district court noted that opponents of the legislation in question "properly characterized the burden of proof placed on affected governmental units in the covered areas as raising a 'presumption of illegality' with regard to changed election procedures."

tricts (finding them equal), and the number of majority black VAP districts (finding the differences insubstantial), but gave no consideration at all to those additional districts in which the Statutory Plan substantially diminished blacks' realistic opportunities (relative to the Settlement Plan) to elect representatives of their choice.

For example, both the Statutory Plan and the Settlement Plan provide for one black VAP majority House district in Leflore County. The Statutory Plan's district has a black VAP of 64.26% (P. Ex. 4B), while the Settlement Plan's district has a black VAP of 71.72% (P. Ex. 35, p. 15). Perhaps more significant than the statistical difference, however, is the testimony by Henry Kirksey (Tr. 927-931) and that of David Jordan, a resident of Leflore County (Tr. 992-1029), showing that the manner in which Statutory Plan Districts 34 and 35 (D.-I. Ex. 20) divide the black community in Greenwood seriously impairs black political organization. In addition, the testimony is that black political power is far greater in a black majority district comprised of urban precincts than in a district in which the black majority resides in rural areas. In the Mississippi delta, rural blacks still fear reprisal for registering or attempting to vote (Tr. 928-931, 999). To some extent, that fear remains even when rural blacks move to the city (*id.* at 999). Recent difficulties in getting black students registered in Leflore County (*id.* at 993-997), moreover, suggest that present discrimination as well as present effects of past discrimination still inhibit black voting potential in that county. The result is that a black

VAP of 65%, when it is made up of plantation dwellers, is not enough in Leflore County to give blacks a reasonable opportunity to elect candidates of their choice; the Settlement Plan's House District No. 35 (see D.-I. Ex. 21), by maintaining the Greenwood black concentration intact, does offer blacks that chance (see Tr. 927-931, 1022).

The district court's response to challenges of this nature was to justify the Statutory Plan's districts in terms that—while they may have some bearing upon the issue of discriminatory purpose—have no bearing upon the question whether one plan offers less opportunity than another for blacks to realize their political potential. No one contends, for example, that the Settlement Plan is defective from the point of view of compactness of districts or division of cities; if the Statutory Plan's districts are retrogressions, then, it is irrelevant that those districts follow traditional east-west lines (Hinds Co.), or (if it is true) are marginally more compact or more inclusive of complete cities (Marshall, Leflore) than the Settlement Plan (App. A, *infra*, 19a-22a).[9]

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[9] The contention that the Settlement Plan creates heavily black districts only by diluting black strength in adjacent districts would, of course, have a bearing on the retrogression issue (see App. A, *infra*, 19a-21a) (Hinds, Adams, and Leflore Cos.), but closer examination proves this "justification" wholly illusory. For example, it is possible to create only one majority black district in Leflore County; the issue is whether that district will have 72% black VAP, and its neighbor, 32% (Settlement Plan, P. Ex. 35) or whether one will have 64% black VAP, and its neighbor, 38% (P. Ex. 4B). The neighboring district, in other words, already has so small a percentage of blacks that it cannot be meaningfully diluted by a 6%—or a 10%—reduction.

Finally, the analysis of retrogression is part of the inquiry into racially discriminatory *effect*. If the effect of one plan is to diminish black voting strength as compared to another plan, there is retrogression, whether or not that effect might have been averted by earlier or more vigorous efforts on the part of blacks in Mississippi to call alternatives to the Joint Committee's attention (see App. A, *infra*, 18a-27a).[10] In any event, this rationale could not apply to the Attorney General, the defendant in this case, whose general responsibilities under the Voting Rights Act do not include assisting the Joint Committee in its day-to-day work or testifying at its hearings.

In sum, the district court did not deny that the challenged districts have a dilutive impact upon black voting strength. At best, it adopted the State's rationalizations of these effects against an attack based upon discriminatory purpose. But the court failed to recognize the relevance of these district-by-district challenges to the overall determination whether, compared to the Settlement Plan, the Statutory Plan substantially diminishes gains achieved by Mississippi blacks in obtaining access to the political process.

2. The district court erred in considering only the statewide impact of the Statutory Plan relative to the Settlement Plan, declining to accord significance to

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[10] As indicated in point 3, *infra*, we do not agree that the State had inadequate warning of the alternatives preferred by the United States or the defendant-intervenors, for the plans submitted in *Connor* and the depositions taken in that case raised most of the same issues ultimately raised here.

retrogression in the position of black voters in the counties that constitute the disputed districts. Loss of two majority black districts, for example, may seem insubstantial in state-wide terms, but it is of vital importance in Warren and Hinds Counties.

Counties are the most important units of local government in Mississippi. Although the boards of supervisors exercise the principal administrative functions, they have little legislative power. Legislation affecting the county is passed by a system of local or private bills (also called bills of local application) in the state legislature. As a result, the county delegation to the legislature plays a particularly crucial role. See *Connor* v. *Finch*, 419 F. Supp. 1072, 1074 (S.D. Miss. 1976), rev'd, 431 U.S. 407 (1977), citing *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Finch*, 431 U.S. 407, 418 (1977). For more than a decade, this was the reason offered for respecting county boundaries in legislative apportionment even though it resulted in use of either multimember districts or grossly malapportioned districts (*ibid.*). Even the present Statutory Plan was based upon instructions to avoid dividing counties more than necessary (*id.* at 413, n.10). Any reduction in the chances blacks have to elect a representative of their choosing to the delegation representing their county's interests in the legislature, then, must be viewed as seriously retrogressive.[11]

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[11] The contrast between viewing the Statutory Plan apportionment on a state-wide or a county-by-county basis is more apparent if the following figures are considered. There

3. The district court also erred in concluding that the Statutory Plan reflects no racially discriminatory purpose. This conclusion is based entirely upon the finding (App. A, *infra*, 26a, Finding No. 48) that the State's technical experts "acted with the purpose of creating black VAP majority districts" and "did not act with the intent or purpose of denying or abridging the right to vote * * * on account of race." Legislatures, not experts, adopt reapportionment plans and, as this Court noted in *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977), [d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." In determining that there was no racial purpose behind the Statutory Plan, the district court failed to give weight to the three most significant factors suggested in *Arlington Heights, supra*, 429 U.S. at 266-267: racially discriminatory effect, a "historical background * * * reveal[ing] a series of official actions taken for in-

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is only one county—Hinds—capable of generating more than one black VAP majority House District and one such Senate District. In all the other disputed districts, then, the issue is whether blacks will have any chance to elect one member of the county delegation to the House or *none* or to have a voice in electing the Senator who sits on his county legislative delegation or not. From this perspective, the matter is not de minimis by any standard. Moreover, every county in Mississippi is "covered" under Section 4 of the Voting Rights Act, and election changes affecting a single county would be subject to Section 5 clearance.

vidious purposes," and the "specific sequence of events leading up to the challenged decision".

(a) The record reflects that in each of the disputed districts, the State has unnecessarily fragmented "what could otherwise be * * * cohesive voting communit[ies]" (*Robinson* v. *Commissioners Court, Anderson County*, 505 F.2d 674, 679 (5th Cir. 1974)), and combined portions of heavily, often activist, black areas with heavily white areas.[12] The district court's justifications for these dilutive configurations are neither consistent nor rational. For example, although a major city is kept intact in only one of the five disputed Statutory Plan House districts mentioned above (Marshall Co.-Holly Springs), the district court justified the Leflore and Marshall County House districts on the ground that suggested alternatives divide major cities (App. A, *infra*, 21a-23a, Finding No. 47(1)(d) and (e)). Again, the district court took at face value testimony that the decision to draw north-south district lines in the delta was evidence of a

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[12] For example, see Tr. 279-283, 821-823 (Warren Co.); Tr. 332-333, 831-834, 955-958 (rural Hinds Co.); Tr. 334-335, 845-855 (Leflore Co.); Tr. 838-845, 979-984 (Adams Co.); Tr. 856-860 (Marshall Co.). The Statutory Senate districts in Washington-Sharkey-Issaquena divide the black concentration in the City of Greenville (Tr. 888-892, D.-I. Exs. 32 and 33); a "seahorse" shaped Senate district in the Jackson area of Hinds County pairs poor blacks with an affluent white suburb, when more logical configurations would not do so (Tr. 871-875, D.-I. Exs. 28 and 29); and the Senate district for Holmes-Madison-Yazoo combines the Holmes County blacks with an increasingly white, noncontiguous segment of Madison County (Tr. 883-888, 1204-1206; P. Ex. 5).

purpose to avoid dilution (App. A, *infra*, 5a, Finding No. 13; Tr. 253-254). Yet rigid adherence to that decision results in creation of two elongated delta Senate districts in Washington, Sharkey, and Issaquena Counties—districts in which no black can successfully campaign (Tr. 1096). Moreover, a dilutive configuration in non-delta rural Hinds County is rationalized (App. A, *infra*, 20a, Finding No. 47 (1)(b)) as an adherence to traditional east-west district lines.

(b) The district court took the position that the State's experts acted without discriminatory purpose when they declined to adopt suggested alternatives called to their attention after early December 1977 (App. A, *infra*, 19a, 33a, Finding No. 47(1)(a) and Conclusion No. 22) although the plan was not passed until March 1978. Quite apart from the fact that virtually all the alternatives appeared in the plans of the *Connor* parties [13] (in most cases in plans filed in October 1977), it is far from clear what compelling purpose required the Joint Committee to cut off all consideration of alternatives in mid-December. Indeed, the experts were apparently denied authority to make revisions, in the process of drawing up the precinct plan, based upon challenges that had arisen during *Connor* depositions in December and January (Tr. 345). Arguably, this cut off contributions to

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[13] *E.g.*, Tr. 370 (Warren Co.); Tr. 710-712 (rural Hinds Co.); Tr. 843-844 (Adams Co.); Tr. 877-879 (Hinds Co.-Senate). The Marshall County House districts appearing in the Settlement Plan derive from the Special Master's Plan (Tr. 1492).

the legislative process by the very blacks who had the most thorough and longstanding relationship to Mississippi apportionment problems.

Mississippi's statutory reapportionment plan was not devised or enacted upon a clean slate. Historically, state action in Mississippi has denied and abridged blacks' access to the political process. The reapportionment of 1978 is not the first effort by the State to create districts which would pass muster under Section 5 or the Constitution. In view of this history, the specific events leading up to this plan's adoption, and the evidence of unjustified dilutive effect, the district court erred in rejecting the contentions that the plan evidenced racially discriminatory purpose.

4. This case remains vital and important although the 1979 elections will have taken place by the time this Court has an opportunity to review the Statutory Plan. While Mississippi may have an obligation, under its own constitution, to reapportion again after the 1980 Decennial Census, the Statutory Plan in issue does not expire until it is superseded. The history of the past 14 years offers little assurance that Mississippi will reapportion soon enough after 1980 to supplant the present Statutory Plan with another for the 1983 quadrennial elections, or, if it does, that the new plan itself will not be suspended by further litigation.

Even assuming that an expeditious new reapportionment is likely, the present plan, in our view, is sufficiently dilutive and retrogressive to justify special elections in the disputed districts once the declaratory

judgment clearing the plan under Section 5 has been vacated. Those districts, while representing only a relatively small proportion of the total 122 House and 52 Senate Districts, are all located in the areas of heaviest black concentration and political organization, and therefore represent far more than a small fraction of black citizens' potential political strength.

Finally, assuming the Voting Rights Act is still in effect (or is extended again),[14] the Statutory Plan, if not struck down, will constitute the benchmark for evaluation of the next apportionment submitted under Section 5. The adverse effects of the district court decision in this case thus potentially prejudice blacks' access to the Mississippi political process well into the 1980's.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1979

[14] Under the Voting Rights Act of 1965, Section 4(a) (42 U.S.C. 1973b(a)), Mississippi will be able to "bail out" of coverage under Sections 4 and 5 of the Act when it can demonstrate that it has not had a "test or device," the purpose or effect of which was to "deny or abridge" the right to vote on the basis of race or color, for 17 years (*i.e.*, in 1982, if the State ceased using all such devices promptly in 1965).

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1425

[Filed Jun. 1, 1979]

STATE OF MISSISSIPPI, PLAINTIFF,

vs.

UNITED STATES OF AMERICA and GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, individually and in his official capacity, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was heard upon plaintiff's request for declaratory relief pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. It concerns the validity of the Mississippi Legislature's statutory legislative reapportionment plan, Miss. Laws, 1978, Chs. 515 and 535, H.B. 1491 and S.B. 3098, enacted in March, 1978. The hearing took place September 18-27, 1978, at which a record of more than 1500 pages of oral testimony was compiled and more than 80 exhibits received in evidence. The matter has been extensively briefed by all parties. Based on this record of the evidence presented and on the applicable law, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. *Factual and Procedural Background*:

1. In 1965, private plaintiffs filed a complaint entitled *Connor* v. *Johnson* in the Southern District of Mississippi (hereinafter referred to as "the *Connor* Court") challenging the constitutionality of Mississippi's 1962 legislative reapportionment plan for the Mississippi Legislature. The 1962 plan, as well as successive legislative attempts to redistrict Mississippi's legislature for the 1967 and 1971 elections, were held unconstitutional by the District Court. *Connor* v. *Johnson*, 330 F. Supp. 506 (S.D. Miss.), *supplemented in* 330 F. Supp. 521 (S.D. Miss. 1971); *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss. 1967); *Connor* v. *Johnson*, 256 F. Supp. 962 (S.D. Miss. 1966). Consequently, court-ordered plans were implemented for the 1967 and 1971 elections.

2. In April, 1975, the Mississippi Legislature again attempted a reapportionment plan. The 1975 plan, although approved by the District Court, was declared ineffective by the Supreme Court until precleared pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *Connor* v. *Waller*, 421 U.S. 656 (1975). The Court's decision was without prejudice to a ruling by the *Connor* Court ordering the 1975 plan into effect if no other plan was formulated in time for the 1975 elections. *Id.* at 656-57.

3. On June 9, 1975, Mississippi submitted its 1975 reapportionment plan to the Attorney General for

section 5 preclearance, and on June 10, 1975, the Attorney General interposed an objection to the plan.

4. On June 25, 1975, the *Connor* Court announced its intention to formulate a "temporary plan for the election of Senators and Representatives for the 1975 elections." *Connor* v. *Waller*, Civ. No. 3830 (S.D. Miss. June 25, 1975). Then, by orders of July 8 and July 11, 1975, the *Connor* Court ordered into effect an apportionment plan for the 1975 quadrennial election (hereinafter referred to as the "1975 court-ordered plan"). The 1975 quadrennial election in the Mississippi House and Senate, held in accordance with the 1975 plan, resulted in the election of the current Mississippi Legislature.

5. On November 18, 1976, the *Connor* Court formulated an apportionment plan to take effect for the 1979 quadrennial election. *Connor* v. *Finch*, 419 F. Supp. 1072, 1089 (S.D. Miss.), *supplemented in* 422 F. Supp. 1014 (S.D. Miss. 1976) (hereinafter referred to as the "1976 court-ordered plan").

6. On May 31, 1977, the Supreme Court held that the 1976 court-ordered plan was unconstitutional on malapportionment grounds and returned the matter to the District Court with instructions to draft a new plan for the 1979 elections. *Connor* v. *Finch*, 431 U.S. 407 (1977). The Court cautioned the District Court on remand to draw legislative districts that were reasonably contiguous and compact or to explain precisely why, in a particular instance, that goal could not be accomplished. *Id.* at 425-26.

7. On August 2, 1977, the *Connor* Court directed the parties and invited the Mississippi legislature to file proposed plans for its consideration.

8. On August 9, 1977, the Governor of Mississippi called a special session of the legislature to consider the establishment of a joint legislative committee for the formulation of a legislative reapportionment plan.

9. At the August special session of the legislature, a Special Joint Committee on Reapportionment (hereinafter referred to as "the Joint Committee") was created and State Representative Thomas Campbell was elected its chairman. The Joint Committee retained as its special counsel, Mr. Jerris Leonard of Washington, D.C., former Assistant Attorney General of the United States for Civil Rights.

10. For the purpose of formulating the proposed plan, the Joint Committee interviewed experts on apportionment recommended by the Attorney General of Mississippi, Jerris Leonard, and Marshall Turner, Assistant Chief of the Demographic Census Staff of the United States Bureau of the Census. Of those interviewed, the Joint Committee selected Mr. Thomas Hofeller of California, Dr. Delbert Dunn of Georgia, Mr. Calvin Webb of New York, and Dr. Richard Morrill of the State of Washington. Each of those selected had prior experience in the formulation of reapportionment plans.

11. In addition to those experts selected from outside the state, the Joint Committee hired Earl Fortenberry, formerly the Director of the Legislative Serv-

ices Office of the State Senate, as Director of the Joint Committee's staff. Mr. Fortenberry had previously participated in the development of reapportionment plans for the Mississippi Senate. Fortenberry in turn hired as staff five people, including two blacks who were graduate students at Jackson State University, to assist with the efforts of the Joint Committee staff.

12. In formulating the plan, Joint Committee experts and staff were instructed by Special Counsel Jerris Leonard to minimize population deviations among districts, to avoid diluting black voting strength, to create one complete district in counties whose populations were large enough for the election of a representative or senator, to avoid splitting a county into more than two segments unless two or more districts could be derived from the same county, and to create compact and contiguous districts.

13. To avoid dilution of black voting strength, staff experts looked at the general demographic makeup of the state and noted that, as a general rule, black concentrations of population existed in western portions of the state. They further noted that, with certain exceptions, counties in the eastern portion of the state contained significantly fewer blacks. The experts tried to avoid the combining of counties in the western portion of the state, which contained heavy black population concentrations, with counties from the eastern portion of the state containing heavy white population concentrations. This goal was accomplished by running the district lines from north to south rather than from east to west.

14. Avoiding dual incumbencies was another goal which the Joint Committee attempted to achieve so long as it could be accomplished while observing the criteria given to the Committee staff for devising the plan. Hofeller and Fortenberry first prepared the plan without regard to incumbency. When requests for changes emanating from a dual incumbency situation arose, solutions were checked to assure that they did not adversely impact established criteria, especially those concerning the maintenance of *de minimus* deviation and avoidance of dilution of black voting strength. As a result of changes made in the plan to avoid dual incumbency, 46 senators and 106 representatives were preserved in their respective districts while 6 senators in three districts and 16 representatives in eight districts were pitted against other incumbents for reelection.

15. The Joint Committee developed a computer data base for the plan derived from 1970 census data acquired from the Bureau of the Census. The Joint Committee chose 1970 census data because it provided neutral data considered to be as accurate as possible, available for the entire state, collected by similar methodology throughout the state, available for geographic areas within counties as well as for whole counties in the state, and easily replicated and verified for any given district or area.

16. The Joint Committee initially based its plan upon Census Enumeration District Lines (ED's) rather than precinct lines. After developing the ED plans for the House and Senate, the Joint Committee submitted the plans to the *Connor* Court. Both the

Legislature and the Court expressed a preference for a plan using precinct lines as a means of avoiding voter confusion and of eliminating the need for re-registration of voters.

17. Because of the preference expressed for precinct lines, the Joint Committee staff was directed to convert the ED plan to a precinct plan by moving the boundaries of districts based on EDs to the nearest precinct line.

18. In order to convert the plans to precinct plans the Joint Committee found it necessary to obtain data on the EDs when split by precinct lines. The Joint Committee staff would draw the "split" of an ED on a Census Bureau map of the ED and forward the map to the Census Bureau. The Census Bureau would return population figures for both sides of the line splitting the ED. The Census Bureau, however, could not provide the exact racial composition of the split. This was determined by a computerized proportional allocation of black and white population within the ED to each side of the "split" line.

19. The resulting shift from the ED-based plan to a precinct-based plan was primarily a matter of refinement. It is not disputed that the basic configurations of the districts contained in the original ED plan and those of the resulting precinct plan are thus essentially the same.

20. The process used in developing the Joint Committee's plan was open to public participation and input. On October 11, 1977, the Joint Committee conducted public hearings on those plans presented to

the District Court in *Connor*, and, on November 28, 1977, the Joint Committee conducted hearings on its statutory ED plan. No hearings were conducted on the precinct plan subsequently drawn from the ED plan. The hearings of October and November, 1977, were well publicized in advance and opportunity was afforded to all interested parties to submit their suggestions and objections.

21. The Joint Committee was responsive to those suggestions ultimately submitted. Suggestions were incorporated into the plan whenever the resulting redistricting was feasible in view of other criteria governing the formulation of the plans.

22. After months of consultation, the House plan as drafted by Hofeller and the Senate plan as drafted by Fortenberry were adopted by the Joint Committee and were introduced on the floor of the legislature. These two plans, submitted as H.B. 1491 and S.B. 3098 (hereinafter referred to as the "statutory plan") were adopted without floor amendment.

23. On April 21, 1978, the Governor of Mississippi approved and signed into law the two bills, S.B. 3098 and H.B. 1491, (Mississippi Laws, 1978, Chapters 535 and 515).

24. In June, 1978, the District Court in *Connor* directed the parties to confer for the purposes of arriving at a settlement of the *Connor* v. *Finch* litigation pending in the Southern District of Mississippi. The Joint Committee participated in these negotiations. In response to the objections to the statutory plan by the *Connor* plaintiffs, the boun-

daries of a number of districts in the plan were altered by the staff of the Joint Committee and a settlement proposal was submitted to the Joint Committee. The Joint Committee then informally polled the members of the Mississippi Legislature (the Legislature not being in session) to determine whether this settlement proposal was acceptable. In August, 1978, a majority of both houses of the Mississippi Legislature by a vote of 80 to 13 in the House and 26 to 7 in the Senate voted in favor of accepting the *Connor* settlement plan as an alternative to the statutory plan. After this poll, the Joint Committee accepted the settlement plan and recommended to the defendants in *Connor* that they enter into a consent decree incorporating this settlement proposal.

25. On June 1, 1978, the Attorney General for the State of Mississippi, submitted the statutory plan to the Attorney General of the United States for federal preclearance pursuant to section 5 of the Voting Rights of 1965, 42 U.S.C. § 1973c. By letter of July 31, 1978, the Attorney General, by his designated agent Drew S. Days, III, the Assistant Attorney General in charge of the Civil Rights Division, rendered a timely objection pursuant to section 5 of the Voting Rights Act stating that "we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color." Letter from Drew S. Days, III, to Mississippi Attorney General A. F. Summer, July 31, 1978.

26. On August 1, 1978, Mississippi's Attorney General received, by telephone, notification of the Attorney General's objection. The same day, the State of Mississippi filed this action against the United States and Attorney General Griffin B. Bell seeking a declaratory judgment pursuant to section 5 of the Voting Rights Act.

27. On August 31, 1978, ten black citizens and registered voters of the State of Mississippi filed a motion to intervene as defendants and attached to their motion their proposed answer denying the material allegations of the complaint, denying that plaintiff was entitled to the relief requested, and alleging as an affirmative defense that the statutory plans "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise" in violation of their rights secured by section 5 of the Voting Rights Act, and further that the statutory reapportionment plan dilutes, minimizes, and cancels out black voting strength in violation of intervenors' rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. On September 18, the Court granted intervenors' motion for leave to intervene and to file their answer in intervention (order of September 18, 1978). As stated previously, this matter was subsequently heard during the weeks of September 18 through September 27. After proposed findings of fact and conclusions of law with accompanying briefs had been submitted, oral argument was conducted on January 16, 1979.

28. On March 26, 1979, the Supreme Court, upon a motion to seek a writ of mandamus, instructed the *Connor* court to issue a reapportionment plan forthwith, in accordance with its previous mandate in *Connor* v. *Finch*, 431 U.S. 407 (1977).

29. On April 13, 1979, the Southern District of Mississippi issued a final judgment in *Connor* v. *Finch* and adopted a slightly modified version of the settlement plan previously submitted to the court by the parties. It is undisputed that the resulting court-ordered plan is not substantially different from the settlement plan from which it was drawn.[1]

II. *Present Voting Conditions in Mississippi*:

30. Pursuant to its Constitution, Mississippi has maintained a bicameral legislature made up of a Senate and a House of Representatives. Members of each branch are elected quadrennially. The Constitution of Mississippi requires that the Senate consist of no less than 45 but no more than 55 members. Similarly, the Mississippi Constitution requires that

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[1] The court-ordered plan of April 13, 1979, while not in existence at the time this Court heard this case, is a matter of judicial notice. Throughout these Findings of Fact and Conclusions, it is treated as substantially identical to the settlement plan and has been so conceded by all parties. Defendant United States' letter to the Court of April 17, 1979 ("Substantially the same as the settlement plan") ; Defendant-intervenors [sic] supplemental memorandum of April 27, 1979 ("The court-ordered plan of April 13, 1979 orders the settlement plan into effect 'with three minor changes' which do not affect 'any of the majority black districts in the settlement plan.' ").

the House consist of no more than 122 members. The Senate currently consists of 52 members and the House consists of 122.

31. Any registered voter in Mississippi can have his or her name placed upon the ballot as an independent candidate in the general election for the Mississippi legislature by presenting a petition to the appropriate body designated in the statute signed by 50 registered voters 60 days before the quadrennial general election. Miss. Code Ann. § 3260 (1972). To be elected, a candidate thus nominated needs only a plurality in a general election, Miss. Code Ann. § 3279 (1972 & Supp. 1978) *as amended* by H.B. 44 (Chapter 429, Mississippi Laws 1978). A candidate for party nomination, on the other hand, must win a majority of the votes cast in order to win the nomination of his party. Miss. Code Ann. § 23-3-69 (1972).

32. According to the 1970 census, blacks in Mississippi comprise 36.8 percent of the total population of the state and 31.5 percent of the state's voting age population (hereinafter referred to as "VAP").

33. Mississippi has in the past used such devices as the literacy test, the poll tax and the white primary to exclude its black citizens from participation in the electoral process. Indeed, until passage of the Voting Rights Act in 1965, use of racially discriminatory tests and devices effectively excluded black people in Mississippi from exercise of the franchise. *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (per curiam); *United States* v. *State of*

Mississippi, 229 F. Supp. 925, 983, 987 (S.D. Miss. 1964), *rev'd and remanded*, 380 U.S. 128 (1965).

34. The effect of Mississippi's past history of racial discrimination in voting and other areas continues to affect black people in many portions of the state today, which has resulted in a generally lower participation by blacks than whites in the political process. Consequently, proportionally fewer blacks are registered to vote than whites, and black voters turn out at the polls at a lower rate than white voters.

35. Analysis of past election returns show that racial bloc voting has prevailed throughout the State of Mississippi. Those participating in the electoral process suggest that racial bloc voting continues to occur throughout the state today.

36. Low black voter registration and voter turnout combined with racial bloc voting make it necessary for an electoral district in Mississippi to contain a substantial majority of black eligible voters in order to provide black voters with an opportunity to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.

37. Recent legislative reapportionments in Mississippi have failed to meet constitutional requirements and have been marked by the racially discriminatory use of multi-member districts. *Connor* v. *Williams*,

404 U.S. 549 (1972); *Connor* v. *Johnson*, 402 U.S. 690 (1971). Such uses of multi-member districts have, in the past, tended to submerge black population concentrations in heavily white concentrations.

38. The present legislature in Mississippi was elected pursuant to a 1975 temporary court-ordered plan containing multi-member districts.

39. Only four out of 122 house seats in the Mississippi legislature today are occupied by blacks. None of the 52 senate seats is occupied by blacks.

III. *Nature of the Statutory Plan*:

40. Viewing the state as a whole, and comparing the statutory plan with the demographic distribution of population among Mississippi's 82 counties, the evidence demonstrates that the plan, in overall statistical effect, reflects the geographic distribution of black population within the state.

41. The maximum deviation of S.B. 3098 is 11.39 percent. The maximum deviation of H.B. 1491 is 10.8 percent. These are consistent with the broader tolerances allowed legislatures, but not courts, in fashioning apportionment plans.[2]

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[2] Comparison of total deviations from population equality of the statutory plan with the settlement plan.

	Senate	House
State's Statutory Plan	11.39%	10.08%
Connor Settlement Plan	11.39%	9.94%

Total deviation, as used herein, is the total span of variances calculated by adding the largest plus variance and the largest minus variance.

42. Mississippi's counties are unequal in population. While 30.5 percent of Mississippi's counties have a majority black population, only 25.2 percent of the state's population live in those counties. 30.8 percent of the senate districts in S.B. 3098 have black majority populations. This percentage closely corresponds to the number of counties that have a majority black population.

43. 24.6 percent of the house districts have a majority black population. The percentage of black majority districts in H.B. 1491 is lower than the percentage of black majority districts in S.B. 3098 (30.8%) and the corresponding percentage of black majority counties (30.5%). Senate districts and counties, however, are larger geographically than the 122 house districts. The smaller house districts in H.B. 1491 contain greater densities of black population than do the larger geographic units. Black majority house districts in H.B. 1491 average 65.4 percent in black population while the corresponding figure for counties is 60.77 percent and for senate districts in S.B. 3098 is 59.3 percent.

44. The statutory plan enhances potential black voting strength when compared to the 1975 court-ordered plan. The statutory plan contains two more black VAP majority districts in the senate (10) and four more black VAP majority districts in the house (26) than the 1975 court-ordered plan. It also contains two districts in the senate with a black VAP of 60 percent or more and ten more districts in the

house (14) with a black VAP of 60 percent or more. Furthermore, the statutory plan contains single-member districts only.

45. A statistical comparison of the 1975 court-ordered plan with the statutory plan demonstrates the following with regard to black voting age population (VAP):

% Range	1975 Plan (No. of Dists House)	H.B. 1491 (No. of Dists House)	1975 Plan (No. of Dists Senate)	S.B. 3098 (No. of Dists Senate)
40-100%	40	38	14	16
45-100%	30	30	12	14
50-100%	22	26	8	10
55-100%	11	20	1	7
60-100%	4	14	0	2
65-100%	3	7	0	0
70-100%	3	3	0	0
75-100%	2	0	0	0
80-100%	1	0	0	0
86-100%	0	0	0	0

46. The following table contains statistical comparison of the statutory plan with the settlement plan adopted by the *Connor* Court on April 13, 1979, broken down to show the number of black majority districts and black VAP majority districts for both the Senate and the House:

	Connor Settlement Plan (Ex. P-35)	State's Statutory Plan (Exs. P-4A, 4B)
Black Pop. Majority Districts	49	46
Black VAP Majority Districts	39	36
HOUSE		
Black Pop. Majority Districts	34	30
65% +	18	15
60%-65%	5	6
55%-60%	5	5
50%-55%	6	4
Black VAP Majority Districts	28	26
65% +	9	7
60%-65%	6	7
55%-60%	7	6
50%-55%	6	6
SENATE		
Black Pop. Majority Districts	15	16
65% +	3	4
60%-65%	4	3
55%-60%	5	5
50%-55%	3	4
Black VAP Majority Districts	11	10
65% +	1	0
60%-65%	0	2
55%-60%	6	5
50%-55%	4	3

IV. *Defendant and Defendant-Intervenors' Objections to the Statutory Plan*:

47. Defendant and defendant-intervenors object, in particular, to the redistricting in the statutory plan of the following counties: [3]

1. *HOUSE PLAN*

(a) *Warren County*

The defendants and intervenors complain that, in the statutory plan's redistricting of Warren County,

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[3] We note that several of the defendant-intervenors find themselves in districts more heavily black under the *Connor* Settlement Plan than under the statutory plans. This fact, in addition to defendant-intervenors' preference for reapportionment by Court decree rather than reapportionment by the legislature, may largely provide the explanation for their intervention in this litigation. (See testimony of Aaron Henry, Tr. pp. 801-02).

STATUTORY PLAN

		SENATE		*HOUSE*	
NAME	COUNTY	POP.	VAP	POP.	VAP
Aaron Henry	Coahoma	Same	Same	Same	Same
Henry Kirksey	Hinds	65.44	62.93	Same	Same
Bennie Thompson	Hinds	42.01	35.41	46.30	39.21
Barney Schoby	Adams	Same	Same	63.23	60.63
David Jordan	Leflore	Same	Same	42.89	37.72
Fred Banks	Hinds	65.44	62.93	Same	Same
		SETTLEMENT PLAN			
Aaron Henry	Coahoma	Same	Same	Same	Same
Henry Kirksey	Hinds	72.33		Same	Same
Bennie Thompson	Hinds	49.71		66.79	59.02
Barney Schoby	Adams	Same	Same	69.40	66.45
David Jordan	Leflore	Same	Same	75.77	71.72
Fred Banks	Hinds	72.33		Same	Same

a heavy black population concentration is divided among three proposed house districts, turning a black majority into a black minority in all three districts. This expression of concern regarding the statutory configuration of Warren County was first reflected in the record during the January 10, 1978 deposition of Hofeller. This configuration was in draft form at the time of the public hearings and no objection had been raised. By that time, however, expert Hofeller's discretion was limited to simply converting the ED plan into a precinct plan. The opportunity to make basic changes to the configuration of districts was no longer open. The settlement plan, which addresses the problem, is thus only a marginal improvement insofar as blacks are concerned, a difference which would not translate into a difference in black representation. The Warren County districts in the settlement plan also remain below the 60% black VAP requisite for districts in which blacks are able to elect a candidate of their choice.

(b) *Hinds County*

The defendants and intervenors complain that the black population concentration in western Hinds County is fragmented, and the resulting three portions of that concentration are paired with greater white population concentrations in Clinton and the Jackson suburbs. In the settlement plan, the boundaries of the three districts that trisect rural Hinds County do not fracture the black concentration in the western portion of the county. As a result, the

settlement plan provides a district in rural Hinds County with a 69 percent black VAP. Representative Buckley, a black member of the Joint Committee from Hinds County and the other three black house members from Hinds County, apparently never raised the question of a majority black rural district prior to the legislature's action. The present objections to the redistricting of Hinds County were not brought to the Committee's attention until December, 1977. The Joint Committee originally intended to follow existing districts in the 1975 plan, which had been approved by the federal court, and to increase the number of black VAP districts from 3 to 5. Representative Buckley objected that such a plan would spread the black population too thinly. In response to Buckley's objection, the plan was changed by reducing the number of black majority seats to four. The enhancement now sought by the defendants and intervenors is of debatable benefit and departs from the traditional plan approved by the federal court, which drew lines from east to west rather than north to south. In addition, in order to create the black VAP in rural Hinds County, the settlement plan necessarily dilutes adjacent districts.

(c) *Adams County*

Defendants and intervenors object to the statutory plan's redistricting of Adams County because the only majority black supervisor's district is split between two districts. The black voting strength in north Adams is allegedly diluted by excluding the

majority black airport precinct from the north Adams district and by pairing north Adams and north Natchez with heavily white precincts. In the settlement plan, the two legislative districts that bisect Adams County leave the only black supervisor's district intact and entirely within the same legislative district, *i.e.*, district 95.

In a memorandum to the Legislative Committee on Reapportionment written by an associate of defendant-intervenors' counsel on behalf of Representative Buckley (hereinafter referred to as the "Barber Memorandum"),[4] Buckley requested a slight shift in the configuration of district 95. In response to Buckley's request, the Committee increased the black VAP in that district, but did not realize that intervenors would not be satisfied unless the Morgantown precinct were eliminated. The resulting increase of five percent in the black VAP of Adams County by excluding the Morgantown precinct, however, would be at the expense of diluting neighboring districts.

(d) *Leflore County*

Defendants and intervenors complain that the statutory plan fragments the southeast Greenwood black concentration. The greatest portion of that black community is paired with heavily white north Greenwood in a white majority district. The remaining black community is put in a predominantly rural dis-

[4] The vast majority of the suggestions contained in the Barber Memorandum was incorporated in the statutory plan. See plaintiff's reply brief, pp. 43-45 for detail.

trict, which, although majority black, does not have a high enough black VAP to enable blacks to elect candidates of their choice. The settlement plan keeps the black population concentration in south Greenwood intact (except for one heavily black ED) and entirely within one legislative district. The districts proposed in the settlement plan, however, are less compact to a considerable degree than the districts in the statutory plan and would also divide the city of Greenwood to a greater extent. The settlement plan increases the black VAP percentage from 64.26 percent to 71.22 percent, while it diminishes the influence of the blacks residing in the adjacent district.

(e) *Marshall County*

Defendants and intervenors object that the statutory plan for Marshall County splits the only supervisors' district which has elected a black supervisor in that county and that the voting strength of the black voters in the county's house district is diluted and minimized by the inclusion of the heavily white Holly Springs precinct No. 5. In the settlement plan, the black supervisor's district is placed almost entirely within district 5 with the result that blacks comprise 62 percent of the VAP. Prior to voicing these objections, however, the intervenors had indicated to the Committee a preference for keeping the city of Holly Springs intact. The configuration now preferred by the intervenors would split the city of Holly Springs. The sole difference between the plans lies in the allocation of one precinct. The result sought by the

intervenors would create a district with a black VAP 6 percentage points higher. This gain is at the expense of creating an irregular shaped district that splits the only major city in the district.

(f) *Desoto County*

Defendants and intervenors contend that the statutory plan avoids the creation of a black population majority district in Desoto County by dividing the county by a north/south boundary. The plan splits up the rural predominantly black portion of the county and includes in each district portions of the heavily white Memphis suburban area in north Desoto County. In the settlement plan, the black population concentration in rural Desoto is left intact. As a result, a majority black population district is created. The settlement plan, however, increases the black voting age population in the district it seeks to change by only 1.8 percent and fails to create a 50 percent black VAP majority. The record does not reflect when, if ever, this particular change was called to the attention of the legislature. Intervenors' initial plan, which they submitted to the *Connor* Court, is identical in its configuration of Desoto County as the statutory plan.

2. *SENATE PLAN*

(a) *Hinds County*

Defendants and intervenors contend that the statutory plan forms a "seahorse district" in its Hinds County Senate plan that pairs a portion of the central

Jackson black population with the heavily white south Jackson area. They contend that alternative plans proposed to the *Connor* Court are more compact and form black populations of over 60 percent in districts 25 and 26. There is no evidence that this change was ever called to the attention of the Committee prior to the enactment of the statutory plan. In any event, the change sought merely increases the black population in an already 60 percent black majority VAP district, a change of dubious benefit to black representation.

(b) *Holmes, Madison and Humphreys Counties*

Defendant and intervenors complain that out-migration of blacks in recent years from the Holmes, Madison and Humphreys County has resulted in decreasing the actual VAP percentage in the statutory plan's redistricting of the area to less than 60 percent. The settlement plan combines Holmes and Humphreys counties and the northern portion of Yazoo County. Defendants and intervenors contend that this configuration is more compact and would provide black voters with a better chance to elect a candidate of their choice. The record does not reflect any evidence that the requested combination of these counties in a single district was called to the attention of the Committee staff at any time prior to the passage of the statutory plans. In any event, the settlement plan would split Madison County across the middle and would dilute the vote in Yazoo County

and in north Madison. The change would result in a net decrease of one 60 percent black VAP majority district.

(c) *Washington, Sharkey and Issaquena Counties*

Defendants and intervenors contend that the statutory plan splits the heavy black concentration in north Greenville and north Washington County between two long, narrow districts, which stretch south for more than 60 miles. The resulting district 22 is majority white, and district 23, although majority black, is alleged to be so diluted that black voters are denied representation of their choice. The settlement plan creates a district that preserves much of the black population in urban Greenville intact within one district. Defendants and intervenors argue that although the settlement plan's district is only about 2 percentage points greater in black majority VAP, it provides black voters with a much better opportunity to elect a candidate because it comprises an urban area where blacks are generally better organized and more politically aware. Intervenor's expert testified that any district drawn in this area would look suspicious because of the small population in the rural areas. The drafters of the statutory plans attempted to draw a more compact plan than the predecessor 1975 plan. The resulting change increases the black VAP in one district by 1.42 percent. We find that the changes in the settlement plan are not significantly different from those created by the

statutory plan or ameliorative of the problem of formulating compact districts in the area.

(d) *Claiborne, Jefferson and Copiah Counties*

Defendants and intervenors object to the statutory plan's pairing of Jefferson and Claiborne counties with majority white Franklin County and the western half of Copiah County. Alternative plans submitted to the *Connor* Court excluded Franklin County or portions of Copiah. The *Connor* plaintiff's plan combined Jefferson and Claiborne with Copiah to form a district with a 55 percent black VAP. Under the statutory plan, however, the Jefferson and Claiborne County districts have a 75.77 percent black population. The intervenors conceded in their Barber Memorandum to the Joint Committee that the Claiborne/Jefferson area could not be hurt by either plan because of its high black voting age population.

48. The evidence demonstrates that the plaintiff's agents in formulating the statutory plan did not act with the intent or purpose of denying or abridging the right to vote of any citizen of Mississippi on account of race. Rather, the individuals involved in drafting and enacting the statutory plans acted with the purpose of creating black VAP majority districts.

49. The evidence demonstrates that differences in black voting strength provided in the statutory plan and in the *Connor* settlement plan are insubstantial. The statutory plan covering both the Senate and the House contains three (3) less black majority voting

districts.[5] Since there are 174 districts in the Mississippi legislature this is an overall difference of 1.7 percent (1.7%). For the Senate, the statutory plan contains one (1) more black majority district than the *Connor* settlement plan. More important, both plans provide the *same* number (16) of black, VAP majority districts with a population of 60 percent or more (see Finding 36 for the significance of this fact and Table in Finding 46 for critical figures). When compared to the settlement plan adopted by the *Connor* Court on April 13, 1979, the legislative plan is not retrogressive in overall black voting strength and does not have the effect of abridging or denying the right to vote of any citizen of Mississippi on account of race.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine this case. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1974 & Supp. V 1975); 28 U.S.C. § 1396(a)(2) (1976); 29 U.S.C. § 2001 (1976).

2. This Court has been properly convened as a court of three judges. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1974 & Supp. V 1975) (hereinafter "section 5"); 28 U.S.C. § 2284 (1976).

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[5] In these three districts, the black majority is less than 60 percent VAP. As "influence districts," they, standing alone, do not represent a significant difference, according to the Assistant Attorney General of the United States for Civil Rights, such as to suggest an improper purpose under section 5. (Day's depo., Pltf's Ex. 25, Tr. pp. 112-115).

3. All the requirements for a Rule 23(a) and 23(b)(2) defendant class action on behalf of the intervenors are met. The defendant class is defined as all black citizens and black registered voters in Mississippi qualified to vote in state legislative elections. Fed.R.Civ.P. 23(a) & 23(b)(2).

4. The Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1974), was enacted to insure the protection of rights guaranteed by the Fifteenth Amendment and "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966).

5. Section 5 of the Voting Rights Act was intended to insure that the gains thus far achieved in minority political participation would not be emasculated or destroyed through new discriminatory procedures and techniques. S. Rep. No. 94-295, at 19.

6. The State of Mississippi is a state subject to the preclearance requirements of section 5. 30 Fed. Reg. 9897 (August 7, 1965).

7. Under section 5, Mississippi may not enforce or implement any change in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" unless such change has either been approved by the Attorney General, or unless Mississippi obtains a declaratory judgment in the United States District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1974 & Supp. V. 1975).

8. The reapportionment plan adopted by the Mississippi Legislature in 1978 regular session, approved by the Governor on April 12, 1978, and the changes resulting therefrom are within the scope of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1974 & Supp. V. 1975); *Georgia* v. *United States*, 411 U.S. 526, 531-35 (1973); *Beer* v. *United States*, 425 U.S. 130, 138 (1966).

9. In an action for declaratory judgment under section 5, the burden of proof is on the plaintiff. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S 301, 328 (1966).

10. Plaintiff's burden in a suit for declaratory relief under section 5 is to demonstrate that the reapportionment plan described in S.B. 3098 and H.B. 1491 do not lead to a retrogression in the position of racial minorities, or that the proposed change fairly reflects the strength of black voting power as it exists. *Beer* v. *United States*, 425 U.S. 130, 139 n. 11, 141 (1976); *Richmond* v. *United States*, 422 U.S. 358, 362 (1975).

11. Mississippi, in meeting its burden of proof, must demonstrate that a racially discriminatory purpose was not among the factors that motivated it in devising its reapportionment plan. *Richmond* v. *United States*, 422 U.S 358, 362 (1975).

12. A discriminatory purpose need not be express, but may be inferred from the totality of the relevant facts. *Washington* v. *Davis*, 426 U.S. 229, 241 (1976).

13. Black voting strength is impermissibly diluted when, designedly or otherwise, an apportionment scheme under the circumstances of a particular case would operate to minimize or cancel out the voting strength of racial elements of the voting population. *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965).

14. In a single-member districting plan, black voting strength may be unconstitutionally and impermissibly diluted, minimized, and cancelled out (1) when heavy black population concentrations are unnecessarily fragmented and dispersed, and (2) when black population concentrations to deny [sic] black voters the opportunity to elect candidates of their choice. *Connor* v. *Finch*, 431 U.S. 407, 421-25 (1977); *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 149 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Robinson* v. *Commissioners Court, Anderson County, Texas*, 505 F.2d 674, 679 (5th Cir. 1974); *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621, 622-24 (5th Cir. 1974); *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court).

15. No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength. *Richmond* v. *United States*, 422 U.S. 358, 370-72 (1975); *Gilbert* v. *Sterrett*, 509 F.2d 1389, 1394 (5th Cir. 1975); *Cousins* v. *City Council*

of the City of Chicago, 503 F.2d 912, 920 (7th Cir. 1974); *Turner* v. *McKeithen*, 490 F.2d 191, 197 (5th Cir. 1973); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, 458 (5th Cir. 1972).

16. A legislative reapportionment plan that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise cannot have "the effect" of diluting or abridging the right to vote on account of race within the meaning of section 5 unless the new apportionment itself so discriminates as to violate the Constitution. *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

17. Although reapportionment plans, which are formulated with less concern for statistical accuracy and the one-person-one-vote concept, may provide a greater number of black majority districts, departure from equal protection one-person-one-vote strictures cannot be required or justified simply as an affirmative act to maximize black voting strength. *See Regents* v. *Bakke*, 98 S. Ct. 2733, 2751 (1978); *Mahan* v. *Howell*, 410 U.S. 315, 328-30 (1973); *White* v. *Weiser*, 412 U.S. 783, 790-93 (1973).

18. *Beer* commands comparison with a preexisting plan to determine "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . ." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

19. The settlement plan, adopted by the *Connor* Court on April 13, 1979, must now be considered the

preexisting plan and the benchmark with which to compare the statutory plan.[6]

20. When compared with the *Connor* Settlement Plan, and taking into account the totality of criteria governing the formulation of the statutory plan and its alternatives, we conclude that the slight differences are not of such significance to find that the statutory plan is retrogressive with respect to black voting strength in Mississippi as it exists today. The proof in this case demonstrates that H.B. 1491 and S.B. 3098 would not lead to a retrogression in the current position of racial minorities with respect to their effective exercise of the electoral franchise and therefore do not have the "effect of denying or abridging the right to vote on acount of race or color." This conclusion to disregard insignificant differences is further supported by the fact that legislative reapportionment is the preferred vehicle for reapportionment, as is reflected by the broader tolerances which are allowed to legislatures, but not to courts, in the matter of deviations from uniform population requirements. As the Supreme Court recently stated, "The

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[6] When compared with the 1975 plan, S.B. 3098 and H.B. 1491 constitute a clear enhancement of the position of racial minorities with respect to their effective exercise of the electoral franchise because S.B. 3091 and H.B. 1491 have a greater number of black voting age majority districts than did the 1975 plan and they provide higher percentages of black vote strength in those districts than did the 1975 plan. Moreover, the statutory plan is the first plan to utilize single-member districts only and avoids the diluting effect of multi-member districts.

Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal Courts should make every effort not to pre-empt." *Wise* v. *Lipscomb*, 437 U.S 535, 539 (1978).

21. Legislative reapportionment plans must be scrutinized to determine if they were enacted with the prohibited "purpose" of denying or abridging black voting strength. The prohibited "purpose" of section 5 may be described as the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection. A law neutral on its face and serving legitimate state ends cannot be held invalid under the Equal Protection Clause without proof of discriminatory purpose. Accordingly, in examining the statutory plan, proof of discriminatory racial purpose is necessary for a finding of the "purpose" proscribed in section 5. *Washington* v. *Davis*, 426 U.S. 229, 239-48 (1976).

22. Mississippi's evidence demonstrates that the principal actors in the development of S.B. 3098 and H.B 1491 acted with a benign purpose.[7] Defendants concede they have no evidence to the contrary and are unable to name anyone they contend acted with improper purpose. Defendant-intervenors, likewise, have failed to introduce such evidence.

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[7] The basic configuration of the statutory plan was complete in December, 1977, well prior to the submission to the *Connor* Court of various alternative plans, which culminated in the settlement plan adopted by the *Connor* Court on April 13, 1979.

23. Defendants and defendant-intervenors have suggested that incumbency concerns in the fashioning of the legislature's plans resulted in an impermissibly racially-discriminatory purpose. It is not improper, however, for a legislative body to consider incumbency in fashioning a reapportionment plan, nor does it demonstrate invidiousness, especially here where the evidence shows incumbency concerns were not permitted to encroach upon configurations designed to recognize and protect black voting strength. *White* v. *Weiser*, 412 U.S. 783, 797 (1973); *Burns* v. *Richardson*, 384 U.S. 73, 89 n. 16 (1966).

24. The implementation of S.B. 3098 and H.B. 1491 for the 1979 quadrennial legislative elections in the State of Mississippi will not have either the purpose or effect of denying or abridging the full and free exercise of the right to vote of black citizens in that state.

25. Plaintiff's prayer for a declaratory judgment preclearing S.B. 3098 and H.B. 1491 as a valid reapportionment plan for use in the 1979 quadrennial election should be granted.

26. Since the statutory plan is upheld, it shall supersede the *Connor* Court plan of April 13, 1979. *Per curiam* opinion of the United States Supreme Court in *Connor* v. *Coleman*, No. 78-1013 decided March 29, 1979, 47 U.S.L.W. 3634.

An order consistent with the foregoing Findings of Fact and Conclusions of Law has been entered this day.

/s/ Malcolm Richard Wilkey
United States Circuit Judge

/s/ J. H. Pratt
United States District Judge

/s/ June L. Green
United States District Judge

June 1st, 1979.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1425

[Filed June 1, 1979]

STATE OF MISSISSIPPI, PLAINTIFF,

vs.

UNITED STATES OF AMERICA and GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, individually and in his official capacity, DEFENDANTS.

ORDER

Plaintiff filed this action on August 1, 1978, pursuant to 42 U.S.C. § 1973c seeking a declaratory judgment that Miss. Laws, 1978, Chs. 515 and 535, H.B. 1491 and S.B. 3098, the statutory reapportionment plan, do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Defendants filed their answer denying that plaintiff was entitled to the relief requested, and the Court allowed ten black Mississippi voters to intervene in this action as defendants on behalf of the class of all black citizens and black registered voters of Mississippi qualified to vote in state legislative elections. The Court having held a hearing and having conducted oral argument on the matter and having issued its findings of fact and conclusions of law, it is, in accordance with the

Court's findings of fact and conclusions of law, this 1st day of June, 1979,

ORDERED, that plaintiff's prayer for a declaratory judgment that Miss. Laws, 1978, Chs. 515 and 535, H.B. 1491 and S.B. 3098, the statutory reapportionment plan, do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color is granted; and it is further

ORDERED, that this action be and hereby is dismissed.

/s/ Malcolm Richard Wilkey
United States Circuit Judge

/s/ J. H. Pratt
United States District Judge

/s/ June L. Green
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1425

[Received June 13, 1979]

STATE OF MISSISSIPPI, PLAINTIFF,

v.

UNITED STATES OF AMERICA and GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS,

and

AARON E. HENRY, ET AL., DEFENDANT-INTERVENORS

NOTICE OF APPEAL

Please take notice that the United States of America and Griffin B. Bell, Defendants in this action, hereby appeal to the United States Supreme Court the final declaratory judgment of the three-judge district court entered on June 1, 1979. The appeal is taken pursuant to 42 U.S.C. 1973c.

UNITED STATES OF AMERICA
and GRIFFIN B. BELL

/s/ Miriam R. Eisenstein
MIRIAM R. EISENSTEIN
Attorney
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I, the undersigned Miriam R. Eisenstein hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Notice of Appeal to the following:

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Supreme Court, U.S.
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NOV 27 1979
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-528

AARON E. HENRY, ET AL., *Appellants,*

v.

STATE OF MISSISSIPPI,

and

No. 79-504

UNITED STATES OF AMERICA and BENJAMIN R. CIVILETTI, Attorney General of the United States, *Appellants,*

v.

STATE OF MISSISSIPPI

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-528

AARON E. HENRY, ET AL., *Appellants,*

v.

STATE OF MISSISSIPPI,

and

No. 79-504

UNITED STATES OF AMERICA and BENJAMIN R. CIVILETTI, Attorney General of the United States, *Appellants,*

v.

STATE OF MISSISSIPPI

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, Appellee moves the final judgment and decree of the United States District Court for the District of Columbia be affirmed on the ground that the questions on appeal are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the District Court for the District of Columbia in this cause is unpublished and is reprinted in the appendices of the Jurisdictional Statements previously filed by Appellant-Defendants and Appellant-Intervenors below.[1]

JURISDICTION

Pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c) and 28 U.S.C. 2284, and following the filing of the appropriate notices of appeal and Jurisdictional Statements before this Court by the adverse parties below, Appellee respectfully submits this Motion to Affirm.

INTRODUCTION

This case was brought before and tried by a three-judge District Court for the District of Columbia (hereinafter "the Section 5 Court") pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c). The case was tried on an expedited basis at the request of Mississippi. The trial testimony consisted of more than 1500 pages and was accompanied by exhibits numbering in excess of one hundred and fifty (150). The case was extensively briefed and fully argued.[2] The voluminous record and briefs were carefully considered by the court below. On June 1, 1979,

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[1] Since Appellee is addressing the arguments contained in two jurisdictional statements, one filed by Defendants below and the other filed by Defendant-Intervenors below, they are hereinafter referred to as "the Government" and "Intervenors," respectively, and as "the Appellants," collectively.

[2] Findings of Fact and Conclusions of Law, p. 1.

Circuit Judge Malcolm Wilkey and District Judges June Green and Harold Pratt issued their unanimous decision that the Mississippi legislative reapportionment [3] "do[es] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." [4] From this decision, the Defendants and Defendant-Intervenors [5] have appealed.

Appellants contend that the judgment is in error in three principal respects, i.e., the Section 5 Court erred (a) in impermissibly shifting the burden of proof with respect to the issue of "purpose"; and (b) when it found certain differences between the statutory plan and the *Connor* settlement plan to be insignificant when comparing them to determine the "effect" of the statutory plan on racial minorities. These assertions of error provide the vehicle for advancing Appellants' basic concern, i.e., that the Section 5 Court granted pre-clearance to a reapportionment plan (referred to hereinafter as "the statutory plan") for Mississippi's 174-district legislature (52 Senate districts, 122 House districts) which the Intervenors below contend is not as desirable politically for blacks in certain limited and specific areas of the State as that achieved in litigation by the Appellants before the three-judge court in *Connor* v. *Finch,* 469 F. Supp. 693 (S.D. Miss. 1969).

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[3] Miss. Laws, 1978, Chs., 515 and 535, H.B. 1491 (the House Plan) and S.B. 3098 (the Senate plan).

[4] Order, p. 1.

[5] The Defendant-Intervenors are "ten black citizens and registered voters of the State of Mississippi," all of whom are hereinafter referred to at times collectively with the Defendants as the "Appellants." Findings of Fact 27.

We respond to Appellants' assignments of error by demonstrating that (a) the record amply supports the pertinent findings of fact made by the Section 5 Court; (b) Mississippi was required to carry and did carry its own burden of proof on the absence of any discriminatory "purpose"; and (c) when the State's plan is compared statistically with the *Connor* settlement plan, there is no discernable retrogression in the position of racial minorities and, indeed, when compared with the federal court plan under which the present legislature was elected, a substantial enhancement of the position of racial minorities is realized.

As is demonstrated *infra,* this case turns primarily on the facts as found by the court below. This brief in support of the State's Motion to Dismiss is lengthy because it contains a detailed statement of the case and recitation of relevant facts which are necessary to demonstrate that the detailed factual findings below clearly support the judgment. The trial evidence was fully and carefully considered by the trial court under its prerogatives and responsibilities as the trier of fact. The findings of fact of three judges were unanimous in support of Appellee's position. When the facts are placed in proper perspective, as we endeavor to do herein, it is clear that there are no substantial legal issues for this Court to consider. In the absence of a showing by Appellants that the findings of fact below are "clearly erroneous," there simply is no reason for this Court to undertake full briefing and review of the lower court's decision. Indeed, we believe that when the background and relevant facts are considered, this Court will see that the "equities" are so strongly in Mississippi's favor that the judgment below should be summarily affirmed.

STATEMENT OF THE CASE AND COUNTERSTATEMENT OF FACTS

On May 31, 1977, this Court held that a 1976 court-ordered plan was unconstitutional on malapportionment grounds and returned the matter to the district court with instructions to draft a new plan for the 1979 elections. *Connor* v. *Finch,* 431 U.S. 407 (1977). Although this Court announced its decision reversing the 1976 plan in May, 1977, the Court's mandate was not received by the district court (hereinafter "*Connor* Court") until July 28, 1977. The *Connor* Court promptly responded to the mandate. On August 2, 1977, it issued an order which required the parties and invited the legislature to file proposed reapportionment plans within 90 days. *Connor* v. *Finch,* 422 F.Supp. 1014 (S.D. Miss. 1977). During the subsequent 90-day period, there ensued a flurry of activity by the executive and legislative departments of the State government. On August 9, 1977, the Governor issued a proclamation calling a special session of the legislature for the purpose of considering the invitation of the *Connor* Court.[6] A few days later, the legislature convened in special session and created the Special Joint Legislative Committee on Reapportionment (hereinafter referred to as the "Joint Committee").[7] The Joint Committee retained as its special counsel, Mr. Jerris Leonard of Washington, D.C., former Assistant Attorney General of the United States for Civil Rights.[8] The Committee interviewed outside experts on reapportionment suggested by the Attorney General of Mississippi,

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[6] Findings of Fact 8.

[7] *Id.* 9.

[8] *Id.* 9.

Special Counsel Leonard and Mr. Marshal Turner, Assistant Chief of the Demographics Staff of the United States Bureau of the Census. Of those interviewed, the Joint Committee selected Mr. Thomas Hofeller of California, Mr. Delbert Dunn of Georgia, Mr. Calvin Webb of New York and Dr. Richard Morall of the State of Washington, all experienced in reapportionment.[9]

The Committee and its staff were to pursue a twofold objective, i.e., preparation of plans both for consideration by the *Connor* Court in response to its invitation to the legislature, and for consideration by the legislature for the purpose of statutory reapportionment.[10] Before these experts commenced their task, they received legal guidance from the Committee's Special Counsel. *The experts and staff were instructed to minimize the population deviation among districts and to avoid dilution of black voting strength.* Subsidiary goals were to observe Mississippi's historical concern for the preservation of county lines and to create compact and contiguous districts.[11] The Committee staff, aided by the retained experts, commenced its efforts to construct reapportionment plans for Mississippi in August, 1977.[12]

Avoiding dual incumbencies was an ancillary objective which the Joint Committee attempted to achieve,

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[9] Findings of Fact 10.

[10] *Id.* 12.

[11] Different plans for presentation to the *Connor* Court and for consideration by the legislature as a statutory plan were prepared due to the greater flexibility accorded by this Court to legislatures in apportionment matters. *Chapman* v. *Meier*, 420 U.S. 1, 27 (1974).

[12] Findings of Fact 8 and 9.

but only so long as it could be accomplished while observing the criteria given to the Committee for devising the plan.[13] The first plans were devised without regard to incumbents. When requests for changes emanating from a dual incumbency situation arose, solutions were checked to assure that they did not adversely impact established criteria, especially those concerning the maintenance of *de minimus* deviation and avoidance of dilution of black voting strength. Although changes were made in the plan to avoid dual incumbencies, six senators and 16 representatives were pitted against each other for re-election, including the Chairman of the Joint Committee, Representative Thomas Campbell.[14]

The Joint Committee developed a computerized data base for the development of its reapportionment plans. The "base" was derived from 1970 census data not only because it provided a neutral data source and was considered to be accurate, but also because it was available for the entire State, collected by uniform methodology throughout the State, available for geographic areas within counties as well as for whole counties in the State, and was easily replicated and verified for any given district or area.[15]

The initial plans developed for submission to the *Connor* Court and for enactment by the legislature as a statutory plan were based on Census Enumeration Districts (ED's) rather than on precinct lines. Precincts in Mississippi do not correspond with ED lines,

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[13] *Id.* 14.

[14] *Id.*

[15] *Id.* 15.

nor is census information uniformly available by precinct throughout the State of Mississippi. ED's are thus the only basis upon which census information is uniformly available for the entire State. It was for this reason that the staff decided to develop its plans based on ED's.[16]

The process of developing the Joint Committee's ED plans was open to public participation and input. On October 11, 1977, and again on November 28, 1977, the Joint Committee conducted public hearings on the ED plans. These hearings were well-publicized in advance and opportunity was afforded to all interested parties to submit their suggestions and objections.[17] The Joint Committee was responsive to suggestions obtained during the public hearings. Suggestions from black leaders and black-oriented social and political organizations were incorporated into the plans whenever the resulting redistricting was feasible in view of other criteria governing the formulation of the plans.[18]

When the Joint Committee's ED-based plans were finally to be submitted to the legislature, a special session was called for this purpose in December, 1977. The legislature expressed a preference for plans using precinct lines as a means of avoiding voter confusion and of eliminating the need for re-registration of voters.[19] Because of the preference expressed for precinct lines,

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[16] Testimony of Appellee's reapportionment expert, Hofeller, Trial Transcript ("Tr."), pp. 196-198.

[17] Findings of Fact 20.

[18] *Id.* 21.

[19] *Id.* 16. This view was consistent with the view of the *Connor* Court which also rejected the ED plans and indicated its preference for precinct plans.

the Joint Committee staff was directed to convert the ED plans to precinct plans by moving the boundaries of the districts based on ED's to the nearest precinct line.[20] The resulting shift from the ED-based plans to precinct-based plans was primarily a matter of refinement. It is not disputed that the basic configuration of the districts contained in the orignial ED plans and those of the resulting precinct plans were essentially the same.[21]

The legislature ultimately adopted the reapportionment plans which were based exclusively on single-member districts in both the Senate and House and utilized precinct lines in place of ED lines. The Governor of Mississippi, before signing the bills into law, sought input from black organizations, including the NAACP. In addition, the Governor sought the view of his cabinet-level Multi-Cultural Advisory Committee with regard to the impact of the proposed plans upon

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[20] *Id.* 17. The Mississippi legislature sits for only 90 days. (Mississippi Constitution, Article I, Section 36) What had to be done in order to make the transfer from ED-based plans to precinct-based plans had to be accomplished prior to March 30, 1978. (The actual voting process began on March 23, 1978. Plaintiff's Exhibit [PX] 47, 47A) Although the configurations had been determined in December, the task facing the Committee as the legislature convened in January, 1978, was a time-consuming one. In order to convert the plan to precincts, the Joint Committee found it necessary to obtain data on the ED's when split by precinct lines. The Joint Committee staff would draw the split of an ED on a Census Bureau map of the ED and forward the map to the Census Bureau. The Census Bureau would return the population figures for both sides of the line which split the ED. The Census Bureau, however, could not provide the exact racial composition of the split. This was determined by a computerized allocation of black and white population within the ED to each side of the "split" line. Tr. 194-197, 274.

[21] Findings of Fact 19.

minorities. His efforts elicited no complaint from the black community regarding the plans before him for signature.[22] On April 21, 1978, the Governor of Mississippi approved and signed into law S.B. 3098 and H.B. 1491, the statutory reapportionment plans now before this Court.[23]

On June 1, 1978, S.B. 3098 and H.B. 1491 were submitted to the Attorney General of the United States for Section 5 pre-clearance. The delay in making the submission from April 21, 1978, to June 1, 1978, was caused by the failure of the Department of Justice to make information in its files available to the State.[24] During the summer months of 1978, while the statutory plans languished in the Department of Justice in Washington, the *Connor* Court, in a June 12, 1978, order, found that the differences between the parties appeared resolvable, and ordered the parties to attempt to settle these differences.

As time went by, the Attorney General of Mississippi, A. F. Summer, became concerned that the Department of Justice's adversary position in the *Connor* litigation would adversely affect its view of the reapportionment plan submitted for Section 5 pre-clearance.[25] With that

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[22] Finch, Tr. 299-302. It should also be noted that the lead appellant, Aaron Henry, is President of the Mississippi NAACP, Co-Chairman of the Mississippi Democratic Party and is a member of the Governor's Multi-Racial Advisory Committee with easy access to the Governor. Mr. Henry testified that he made no objection to the Governor's approving the reapportionment bills. Henry, Tr. 779-780, 801-802.

[23] Findings of Fact 23.

[24] *See* the affidavit of Jerris Leonard, Esq. which is part of the record in the Court below.

[25] The United States was plaintiff-intervenor in the *Connor* litigation.

specific concern in mind, on July 26, 1978, Mr. Summer directed a letter to the Attorney General of the United States, providing in pertinent part:

> Our present concern is that the lingering effect of differences between Mississippi and the Department of Justice during the apportionment litigation of the past and present not affect fair and impartial consideration of our Section 5 Application. We feel that it may be too great a burden and place your Civil Rights Division in an awkward position if they are asked to make a determination on the acceptability of our statutory plan when embroiled in litigation on the same subject matter. This is so because to approve our Section 5 statutory plan, the Civil Rights Division would have to abandon the plan it has been advocating before the three judge court in Mississippi.
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> * * *
>
> We request a fresh perspective on our Section 5 submission. We respectfully request an opportunity to meet with you and have you decide whether the statutory plan enacted by our legislature denies or abridges the right to vote of any citizen in Mississippi on account of race.[26]

On July 31, 1978, Assistant Attorney General for Civil Rights, Drew S. Days III, signed a letter purporting to interpose an objection pursuant to Section 5 of the Voting Rights Act. The letter stated that "we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color."[27] Mississippi did not receive notification that the Attorney General

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[26] Days Dep. Ex. No. 1.

[27] Days Dep. Ex. No. 4, PX 25.

had objected until August 1 (the 61st day).[28] On the same day that Mississippi received notification of the adverse action of the Department of Justice (Department), the State filed a lawsuit against the United States in the court below seeking a declaratory judgment.[29]

At the time Mississippi filed its complaint, its was unaware of the cursory treatment that its Section 5 submission had received within the Department. A law student was assigned to conduct the review, analyze and make recommendations as to the position that should be taken by the Department with regard to Mississippi's submission. The law student, who was neither an expert on the subject of reapportionment nor on the subject of racial demographics, testified that he did not even know whether he had received any instructions on how to proceed with review of the submitted reapportionment plans.[30] Nonetheless, in a letter drafted by him and signed by Assistant Attorney General Drew S. Days on July 31, 1978, the Department of Justice rejected reapportionment plans which had been carefully prepared by the State's retained reapportionment experts. The draft of the letter constituted the initial decision within the Department to object to the Mississippi submission.[31] Despite the request of the Attorney General of Mississippi for an audience with the Attorney General of the United States for the purpose of discussing S.B. 3098 and H.B. 1491 prior to

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[28] Findings of Fact 26.

[29] *Id.*

[30] Tr. 1226-1227, 1284.

[31] Hunter Dep., 13-19.

final action, the matter was not even called to the attention of Attorney General Bell by Department personnel in the Civil Rights Division who were clearly aware of Attorney General Summer's request.[32] Further, Assistant Attorney General Days, who signed the draft, did not even read Mississippi's submission. (It goes without saying that the Attorney General of the Whatever the authority of Assistant Attorney General United States did not read the submission either.)[33] Days to act for the Attorney General in Section 5 matters, he essentially abdicated it to a law student with no particular expertise in the subject area of reapportionment. This left Mississippi with no meaningful recourse but to seek declaratory judgment relief.

At the time the Section 5 suit was filed, settlement negotiations which were initiated pursuant to the direction of a June 12, 1978, order of the *Connor* Court, were nearing conclusion. Although the parties had narrowed their differences, no agreement had been reached. On August 2, Circuit Judge Coleman of the *Connor* panel, in a conference with counsel for all parties, expressed concern that agreement had not been reached. Judge Coleman made it clear during the conference that unless a settlement plan was arrived at, the *Connor* Court would draw its own plan reducing the number of Senate seats from 52 to 45, and the number of House seats from 122 to 90, i.e., a "45-90" plan.[34] The so-called "settlement plan" referred to in the opinion below is the reapportionment scheme which resulted from the attempt by the parties in *Connor* to

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[32] Days Dep., 9-11.

[33] *Id.*, 16-20, 32-35.

[34] Tr. 360-363.

resolve their differences following the August 2, 1978, conference with Judge Coleman.[35] It was based upon the statutory plan with changes made to accommodate certain desires of the black plaintiffs in *Connor*.

Trial on the Section 5 case commenced on September 18, 1978, and consumed eight trial days from September 18, through September 27, 1978. In order to expedite the proceedings, plaintiff (Mississippi) took depositions during trial recesses. At the trial's conclusion, the parties were directed to file post-trial briefs and proposed findings of fact and conclusions of law by October 31, 1978. All parties were thereafter given 15 days to respond to briefs of opposing parties.

The settlement plan was introduced in evidence over the objection of the State during trial proceedings before the Section 5 Court. At the time it was introduced into evidence, it had not been adopted by the *Connor* Court as its judgment. All parties before the Section 5 Court conceded that the settlement plan satisfied the requirements of Section 5 and of the United States Constitution.[36] The two plans contained

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[35] An explicit caveat was appended to the legislature's informal acquiescence in the "settlement plan." Because of the caveat, the settlement plan never matured into the consent decree Judge Coleman had hoped for. The caveat was unrelated to the geographical contours of the settlement plan. The State wanted assurance that no party would use the "settlement plan" in Section 5 proceedings to challenge the statutory plan which had been enacted at a time when the "settlement plan" did not exist. Appellants refused to provide such assurance. *Cf.* FED. R. EVID. 408.

[36] It is interesting to note that the same Department of Justice which, after 60 days of study by a law student who was not an expert in reapportionment matters, came to a conclusion that

the same number of districts (16) with 60% or more Black Voting Age Population (BVAP), but the settlement plan contained three more black population majority districts (49 as opposed to 46) and three more majority BVAP districts (39 as opposed to 36).

On October 12, 1978, Appellants filed a motion for judgment in the *Connor* litigation. The motion proposed that the *Connor* Court enter the settlement plan as its final judgment. *Connor* v. *Coleman*, 440 U.S. 612, decided March 26, 1979.[37]

On April 13, 1979, pursuant to the order of this Court, *Connor* v. *Coleman, supra,* the *Connor* Court entered judgment on a plan which has been conceded by all parties to the litigation below to be substantially identical to the settlement plan insofar as its treatment of racial minorities is concerned.[38] There were,

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Mississippi's statutory plan violated Section 5, later readily agreed that the *Connor* settlement plan, as to which the Section 5 Court recently noted "we conclude that the slight differences are not of such significance to find that the statutory plan was retrogressive with respect to black voting strength in Mississippi as it is today," (Conclusions of Law 20) satisfies both Section 5 and the Constitution.

[37] No action on Appellants' motion for judgment in *Connor* had been taken by the *Connor* Court at the time of final arguments before the Section 5 Court on January 16, 1979. Subsequent to arguments before the Section 5 Court and while awaiting a decision from that Court, Appellants filed a petition for a writ of mandamus directed against the three-judge *Connor* Court. Appellants asked this Court to direct the *Connor* Court to announce a decision. In a *per curiam* opinion, *Connor* v. *Coleman, supra,* this Mississippi legislature "forthwith and without further delay." 440 U.S. at 614.

[38] Findings of Fact 29.

however, substantial differences totally irrelevant to this Section 5 case.[39]

With the foregoing facts before it, the Section 5 Court proceeded to compare the statutory plan with the *Connor* Court plan to determine whether a retrogression in black voting strength would occur if the statutory plan were allowed to go into effect.[40] It concluded that the statutory plan, when compared with the *Connor* Court plan of April 13, 1979, was not retrogressive and did not have as its purpose and would not have the effect of denying the right to vote on account of race.[41]

On June 7, 1979, Intervenors below filed a motion before the Chief Justice, as Circuit Justice for the District of Columbia, asking that the decision of the district court be stayed pending appeal. *Aaron E. Henry, et al.* v. *Mississippi,* No. A-1067. On June 18, 1979, that motion was denied.

On November 6, 1979, statewide legislative elections were held in Mississippi under the Section 5 plan approved by the court below. As a result of those elections, black representation in the State legislature increased threefold.[42]

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[39] *See* the affidavit of Scott Levanway filed in the proceeding below.

[40] *Id.*, 45-47.

[41] The Appellee, however, does not incorporate by reference to the *Connor* plan any argument that the compromise or settlement plan was a valid or logical antecedent comparative plan. It still strongly believes that the 1975 court-ordered plan was the correct comparison benchmark. See discussion at Part II, *infra,* 49-53.

[42] *See* Appendix for tables compiled by the Legislative Counsel to the Mississippi State House of Representatives, comparing partial election results for black candidates throughout the State in

ARGUMENT

I. THE STATE MET ITS BURDEN OF PROOF ON "PURPOSE" AND THERE WAS NO SHIFTING BY THE COURT OF THAT BURDEN TO APPELLANTS.

Appellants contend that the Section 5 Court erred by assigning to them the burden of proof on the State's purpose in enacting the statutory plan and in the trial court's ultimate finding that the evidence demonstrated that the State's purpose was "benign."

We submit that the court properly placed the burden of proof regarding "purpose" upon the State at the outset and never shifted that burden. Appellants' contention to the contrary can be supported only by resorting to a twisted construction of the ruling below.

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key districts for both House and Senate. We ask the Court to take judicial notice of these results. In all, 15 blacks were elected to the House and two to the Senate. We believe this increase to be both dramatic and significant evidence of the State's good faith endeavor to increase the opportunity for the election of black candidates to its legislature, especially where the pre-existing plan was drawn by a federal court. At page 2 of their Jurisdictional Statement, Intervenors below note that Mississippi is 37% black (31.5% BVAP according to the 1970 Census), but that prior to the most recent elections had only five black elected members of the State legislature. "This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." *Beer* v. *United States,* 425 U.S. 130, 136, n. 8 (1976). *See also Whitcomb* v. *Chavis,* 403 U.S. 124, 149 (1971); *Richmond* v. *United States,* 422 U.S. 358, 368 (1975); *Washington* v. *Davis,* 426 U.S. 229, 239 (1976); and *White* v. *Regester,* 412 U.S. 755, 765-766 (1973). If blacks were uniformly spread throughout the State, there could be no black majority districts. The best that a minority can expect is that demographic patterns, which cannot be dictated by the legislature, are fairly reflected in any apportionment scheme. The statutory plan is consistent with geographic distribution of black population in Mississippi. *See* Findings of Fact 40.

Appellee produced overwhelming evidence that the State's agents, charged with responsibility for devising the reapportionment plans, acted without discriminatory purpose. Indeed, the evidence shows that the State's agents acted with the affirmative purpose of creating "winnable" black legislative seats and, irrespective of Appellants' contention that the trial court improperly placed the burden upon the Defendants and Intervenors below, it is clear from the record that the State nevertheless assumed the burden of proof on the issue and went forward to produce overwhelming evidence of nondiscriminatory purpose on the part of its agents.

A. The Trial Court Did Not Shift the Burden of Proof on "Purpose" to the Appellants.

Most laws are clear on their face as to their meaning and simple logic usually permits reasonable inferences to be drawn as to their impact on different segments of the populous. A statewide reapportionment plan, however, is by nature technical and complex. Inquiry as to why individual legislators ultimately voted for it would be "extremely difficult for a court to ascertain." *Palmer* v. *Thompson,* 403 U.S. 217, 224-225 (1975). Most of those who supported it obviously did so because they had faith in the Committee and its staff. Thus the "state of mind" of the plan's drafters is the "scienter" we must look to with regard to the issue of purpose.

As we will demonstrate in Subsection B., *infra,* there was ample proof upon which the court below could and did make an affirmative finding that the statutory reapportionment plan was drafted by persons operating free of any racially discriminatory purpose. The

State's proof as to this purpose, we submit, could withstand a much more exacting standard than mere preponderance of the evidence. The record below demonstrates that Mississippi's trial proof in this regard would have supported the judgment even if the standard had been proof beyond a reasonable doubt.

Despite the overwhelming evidence introduced showing that Mississippi's statutory plan was prepared by persons acting without invidious motivation, Appellants grasp at straws. They point to Conclusion of Law No. 21 and contend that the district court erred by placing the burden on Appellants to affirmatively prove that the State acted with an invidious purpose. Not only is this assertion irrelevant in light of the record evidence below, but in order to make it, Appellants must wrench a part of the district court's Conclusions of Law from context. The district court specifically concluded in paragraphs 9 and 11 of its Conclusions of Law that the burden lay with the State to demonstrate and prove that the State was not motivated by a racially discriminatory purpose:

> 9. In an action for declaratory judgment under Section 5, *the burden of proof is on the plaintiff*. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966) [emphasis added].
>
> 11. Mississippi, *in meeting its burden of proof*, must demonstrate that a *racially discriminatory purpose* was not among the factors that motivated it in devising its reapportionment plan. *Richmond* v. *United States*, 422 U.S. 358, 362 (1975) [emphahis added].

The above paragraphs clearly indicate that the district court viewed the evidentiary standards to be

exactly as the Appellants viewed them. Taking the district court's findings and conclusions as a whole, the reference by the trial court to *Washington* v. *Davis,* 426 U.S. 229 (1976) in Conclusion of Law No. 21 was thus obviously not intended to assign the burden of proof regarding "purpose" to any party. Rather, the reference was intended to define the meaning of the term "purpose" in a Section 5 case. The burden of proof on "purpose" had already been placed upon the State in Conclusions of Law 9 and 11 cited above.

The trial court was unquestionably correct in its definition of "purpose" as that term is used in Section 5. Speaking to the meaning of the concepts of "purpose and effect," Mr. Justice Stevens perceived that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion[s] might assume." *Washington* v. *Davis,* 426 U.S. at 254 (concurring opinion). Both considerations, purpose and effect, have a bearing on each other. Findings of fact as to the genesis and consequences of the statutory plan were, under the statute, the obligation of the district court, but the burden of proof was clearly on the State. As the trier of fact, the Court made a detailed investigation—as the record of over 1500 pages indicates—and made a finding that there was no discriminatory purpose or effect in the formulation of the statutory plan.[43]

Concededly, Mississippi used race and other salient factors in drawing the plan *sub judice.* The district court in fact found that the legislature had considered race as a factor in its determinations, but that in so

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[43] *See* Findings of Fact 48 and Conclusions of Law 22.

doing, it purposefully designed the statutory plan so as *not* to have the proscribed negative effect on the participation of minorities in the electoral process. Rather, the court found that the legislature affirmatively created "safe" black electoral districts."

Pursuant to the landmark case of *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977), it is well-established that it does not adversely jeopardize any statutory plan for the legislature " 'to think in racial terms,' " 430 U.S. at 145, 154-155, 161-162, as long as it does not do so "*invidiously* to cancel out or minimize the voting strength of racial groups." *White* v. *Regester,* 412 U.S. at 765 (emphasis added). Such a proscribed invidious use has been held to be one that must comport with the disingenuous intent "*designedly* or otherwise, [for] a multi-member constituency apportionment scheme, under the circumstances of a particular case, . . . [to] operate to *minimize or cancel out* the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey,* 379 U.S. 433, 439 (1965). To fall under this proscription, it is clear that State action must be such as to "*deliberately* and *systematically* [deny members of] a minority race the right to participate" in the process in question. *Washington* v. *Davis,* 426 U.S. at 240, quoting *Alexander* v. *Louisiana,* 405 U.S. 625, 628 (1972) (emphasis added). Acting outside the legislative prerogatives long recognized by this Court, therefore, it must have been found that the drawing of legislative districts "throughout the State, *were conceived or operated as purposeful devices to further racial or economic discrimination.*" *Whitcomb* v. *Chavis,* 403 U.S. at 149

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[44] Findings of Fact 48.

(emphasis added). This concept of legislative culpability is one which this Court has never shrunk from disciplining. Nor has it had any particular difficulty in applying the clarity of the standard: "The answer is plain, and we need not labor it. An official action, . . . *taken for the purpose of discriminating against Negroes on account of their race* has no legitimacy at all under our Constitution or under the [Voting Rights] statute." *Richmond* v. *United States,* 422 U.S. at 378 (emphasis added).

Proving a negative is never an easy task. Section 5 places the burden on the proponent political jurisdiction. The State accordingly went forward with proof to establish the total absence from legislative determinations of the kind of pernicious bias inherent in the racial standards which have been placed under "suspect classifications" in this Court's previous rulings and which constitute the prohibited "purpose" against which Section 5 seeks to safeguard. The district court accepted this evidence while finding there was no credible evidence from Appellants in support of a contrary finding.

Appellants complain that the court below ignored evidence that districts were designed for the purpose of preserving incumbents, "most of whom are white," in office [45] with the forseeable result of districts which dilute the black vote. *Compare Wright* v. *Rockefeller,* 376 U.S. 52, 66 (1964) (Douglas and Goldberg, J.J., dissenting). The State, however, went forward with evidence and the lower court found that the statutory plan was initially drawn without reference to the residences of incumbents. It was only after the first version

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[45] Intervenors Jurisdictional Statement at 3.

of the plan was drawn that residences were checked to see if it pitted incumbents against each other. Even then, district boundaries were only changed for incumbencies' sake if the change did not produce a racially discriminatory result.[46] Even so, many legislators found themselves running against each other under the new plan.[47] This practice is a proper exercise of legislative authority and not invalid *per se*. *See Burns* v. *Richardson,* 384 U.S. 73, 89, n. 16 (1966) and *White* v. *Weiser,* 412 U.S. 783, 791 (1973). This issue is, therefore, even more *de minimus* than others raised by Appellants and the district court accorded it its due consideration.

It is not this Court's function or duty, therefore, to undertake a *de novo* consideration of the evidence below. The trial court weighed and evaluated the evidence on "purpose" and Appellants make no assertion that the Findings of Fact below relating to "purpose" are clearly erroneous. Thus, weighing and evaluating the credibility of Appellants' evidence, it was not irrelevant for the trial court to link Intervenors' contentions to their political ambitions.[48] Indeed, the best evidence

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[46] Findings of Fact 14.

[47] See page 7, *supra.*

[48] *See* Findings of Fact 47, n. 3. As Mr. Justice Douglas earlier observed in *Oregon* v. *Mitchell,* "Their subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight." 400 U.S. 112, 195 (1970) (dissenting opinion). *See also* Intervenors' Jurisdictional Statement at 24 and Government's at 24. *Beer* v. *United States,* 425 U.S. 130, 157 (Marshall and Brennan, J.J., dissenting) and *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 186 (Burger, C.J., dissenting). As Mr. Justice Harlan opined, "The fact that Negro political leaders find advantage in this nearly-solid Negro . . . district is irrelevant to our problem.

of the unsubstantial nature of the issues in this lawsuit and a direct contravention of Intervenors' major premise is the fact that one of the 17 blacks elected to the Mississippi legislature in the statewide elections of November 6, 1979, is the lead Appellant in Intervenors' case, Aaron Henry. He was elected to the State House of Representatives from Coahoma County (Clarksdale), under the same plan he and his colleagues are indicting in this appeal.[49] This is the same Intervenor who, at the trial below, participated in the following colloquy with the Court and the State Attorney General:

> THE COURT: But one of the contentions that has been made in this case is that black leaders weren't given an opportunity to participate. And what I'm trying to point out is that at least as far as you, Mr. Aaron Henry was [sic] concerned, that you could have participated if you had wanted to.
>
> THE WITNESS: I think I could have, yes, if I had decided to, yes. [Tr. 771] * * *
>
> Q. [BY ATTORNEY GENERAL SUMMER:] So really, Dr. Henry . . . you really feel regardless of what the legislature may be, that *it's your preference to go through the courts and not let the legislature act on things*——
>
> A. As you know, generally, *that's my feeling.* * * *
>
> Q. It is my understanding that you prefer that in other matters as well as reapportionment?
>
> A. Sure.

Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright* v. *Rockefeller*, 376 U.S. at 62.

[49] See discussion of the political implications of the statutory plan, *infra*, 35-49.

> MR. SUMMER: That's all we have, Your Honor.
>
> * * *
>
> THE COURT: I have a couple of questions. I was going to ask them a long time ago, but I think Mr. Summer brought it out at the end.
>
> But if you had two identical plans, one of the statutory plan and one the same plan submitted by the Court, you would prefer the Court plan to the legislative plan.
>
> THE WITNESS: I would for this reason Your Honor. * * * I think that that kind of reaction would give all of us more of a desire to try to make it work. [Tr. 801-803] [emphasis added].

In the face of such an admission, it was not difficult for the court below to see through the challenge to the State's efforts. Its conclusions as to the state of mind, or purpose, with which the agents of the State acted should be affirmed.

B. There Was Overwhelming Evidence to Support the Court's Finding That the Statutory Plan Was Drafted Without the Purpose Prohibited by Section 5.

After setting forth the facts surrounding the development of the statutory plan in detail, the court stated in Conclusion of Law No. 22:

> Mississippi's evidence demonstrates that the principal actors in the development of S.B. 3098 and H.B. 1491 acted with a benign purpose.[7] Defendants concede they have no evidence to the con-

[7] The basic configuration of the statutory plan was complete in December, 1977, well prior to the submission to the *Connor* Court of various alternative plans, which culminated in the settlement plan adopted by the *Connor* Court on April 13, 1979.

> trary and are unable to name anyone they contend acted with improper purpose. Defendant-intervenors, likewise, failed to introduce such evidence.

It is elementary that findings of fact cannot be set aside unless they are specifically found to be "clearly erroneous." *United States* v. *National Ass'n. of Real Estate Bds.*, 339 U.S. 485 (1950). The possibility that this Court might give the facts another construction, resolving ambiguities differently and thus assigning a sinister cast to actions which the district court deemed benign, provides no succor to Appellants. This Court is not in a position to substitute its evaluation of the evidence for that of the trial court. Appellants have the burden of demonstrating that the district court's findings of fact were clearly erroneous and that burden cannot be met when, as here, the district court's findings are well-supported by findings of fact based on the record evidence.

In their Jurisdictional Statement to this Court, Appellants do not name any person whom they contend acted with improper purpose. Instead, they seem to suggest that there was sufficient evidence from which the court should have inferred some sort of emphemeral invidious force motivating anyone working on behalf of the State. Appellants in this regard allude to (a) a past history of discrimination by the State; (b) evidence of concern for incumbents in the drafting of the statutory plan discussed above at pages 7 and 22-23; and (c) the construction of a handful of particular districts, which they contend fragment and dilute black voting strength when alternative configurations more acceptable to the black Intervenors were known to agents of the State prior to passage of the State's plan.

When the genesis of the State's plan and the so-called "alternative configurations" are considered, however, it is clear that the State acted without invidious purpose.

The Section 5 Court found that the House plan (H.B. 1491) was drafted by Thomas Hofeller and the Senate plan (S.B. 3098) was drafted by Earl Fortenberry.[50] They were the "principal actors" in the development of these plans.[51] Both of these individuals testified as to their respective roles in fashioning the reapportionment plans. No court could believe their testimony and yet find that the reapportionment plans had been drafted with a racially discriminatory purpose. The Section 5 Court found them to have acted with a benign purpose.[52] No evidence contradicting their testimony or impeaching their credibility was introduced. Their testimony that they acted with the purpose of affirmatively creating BVAP majority districts in areas of the State with concentrations of black voters likely to elect candidates of their choice to the Mississippi legislature completely obviates any adverse inference that could be drawn based upon Mississippi's history. The trial court believed and relied on their testimony in this regard.[53] To counter the sworn testimony of the State's retained experts, Appellants build their attempt to show discriminatory purpose primarily by focusing on the configuration of a handful of particular legislative

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[50] Findings of Fact 22.

[51] Hofeller's testimony can be found at Tr. 121-202, 222-274, and 1453-1511; Fortenberry's testimony can be found at Tr. 450-544.

[52] Conclusions of Law 22.

[53] Findings of Fact 48.

districts within the statutory plan and comparing them with alternative configurations in the *Connor* settlement plan. They contend that the State drew a plan with irregularly-shaped districts which fragment and dilute black voting strength when alternative plans exhibiting contiguity, compactness and lower population variances were at hand,[54] and make the assertion that the district court erroneously concluded that these alternatives were not made known to the State's experts until after the basic configuration of the statutory plan was completed.

The fact that there is evidence to show that Committee members were completely open and responsive to suggestions by members of the black community belies any notion that they deliberately closed their eyes to the limited number of alternative configurations preferred by the black Intervenors below. Indeed, we contend that the alternative configurations urged below were either not available at the time the Committee needed them or that the black community, in certain instances, was ambivalent as to exactly what it intended or desired.

We have referred above to the October and November, 1977, widely-publicized public hearings. At the November hearings, Representative Horace Buckley, a black legislator from Hinds County and a member of the Joint Committee, appeared and made suggestions for the House plan which were contained in a memorandum.[55] The memorandum was drafted by Rims Barber, a long-time associate of Frank Parker, Esquire, coun-

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[54] Intervenors Jurisdictional Statement at 24 and Government Jurisdictional Statement at 13, 24-25.

[55] Campbell, Tr. 638-639; PX 24.

sel for Appellants in this case. (Mr. Parker is also counsel for plaintiffs in *Connor*.)[56] The overwhelming majority of suggestions in the "Barber Memorandum" were incorporated into the final statutory plan by the Committee staff.[57]

The responsiveness to Buckley and the suggestions of the Barber Memorandum are not the only instances in which the record below reflects a concern on behalf of the Committee for input from blacks interested in the drafting process. In addition to relying on Barber's suggestions, Representative Buckley had earlier requested that the number of black majority House seats in Hinds County be reduced from five in a draft plan then under consideration, to four. His request was honored.[58] He desired to reduce the number of black majority districts in Hinds County in order to increase the black percentages of those remaining.[59]

Others speaking on behalf of black interests found similar responsiveness to their suggestions from the Committee while the statutory plan formulation was in an embryonic stage. Robert Clark is a black representative from Holmes County,[60] re-elected in the recent

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[56] Rims Barber has been active in black political efforts in Mississippi for a number of years. He has been interested in reapportionment problems throughout the State. (Campbell Tr. 639) He attended depositions with Attorney Frank Parker in Washington, D.C. in this case. (PX 36 ,37B, 38A, 39A, 40A, 41A, 42A) He is associated with the plaintiffs in *Connor* (Hofeller, Tr. 1486) and has been consulted by the defendant-intervenors here. (Schoby, Tr. 986; Kirksey, Tr. 905; Parker, Tr. 649).

[57] *See* Findings of Fact 47(c), n. 4.

[58] Hofeller, Tr. 206-207.

[59] Findings of Fact 47(b).

[60] Hofeller, Tr. 182, 201.

general elections of 1979. Conversations with Clark indicated that he desired a single House district within Holmes County so that it would be better for a black to run in, but with certain black precincts removed so as to eliminate a political opponent from his district.[61] Clark's desires were accommodated in the statutory plan.[62] Clark also sought modifications of the treatment of Holmes County in the Senate plan. The Senate configurations for Holmes County presented at the public hearings divided Holmes into three parts. In response to Clark's request to limit the division of Holmes, which did not have enough population to support a senatorial district of its own, the present configuration which divides Holmes into two parts was fashioned.[63] Representative Clark then voted for the entire plan.[64]

Walter Brown was an unsuccessful black candidate for the legislature from Madison County. He was interested in a particular configuration of districts from that area and expressed his views to his Representative. The result was the construction of the district in accordance with his suggestions.[65]

Aaron Henry, one of the Appellants, made an appointment with his Senator, Jim Molpus, and attorney Frank Parker to acquaint Senator Molpus with the concerns of blacks regarding configurations in Henry's county of residence, Coahoma.[66] Henry's suggested con-

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[61] *Id.*, 201-202.

[62] *Id.*, 183.

[63] Fortenberry, Tr. 478-479.

[64] PX 47A.

[65] Tr. 656-657.

[66] Tr. 751, 782.

figurations, insofar as Coahoma County was concerned, were passed to the committee by Senator Molpus and were ultimately adopted.[67] Henry was elected to the legislature in the recent elections from that district.

The configurations in Adams and Washington Counties were based on the representations from legislators residing in those areas as to the desires of the black community.[68] Intervenor Schoby was elected to the legislature from Adams County.

The foregoing provides overwhelming evidence of affirmative response to input from the black community in the formulation of the final plans and is not diminished in any way by any other evidence in the case. The record instead reveals a "sandbagging" or "dog in the manger" approach to the legislature's efforts by the Appellants. One of them, Fred Banks, a black Representative from Hinds County, refused to provide any input with respect to the drawing of any legislative districts, as demonstrated in the following testimony of Hofeller:

> Q. Now did they [the black members of the legislature] provide input to you, their ideas with respect to the drawing of any of the legislative districts?
>
> A. Some of them did and some of them wouldn't.
>
> Q. Who wouldn't?
>
> A. Mr. Banks did not. Mr. Anderson provided some limited input in terms of his own district. Mr. Buckley [who] was a member of the committee, provided a considerably greater amount of input in all of the committee meetings and in written form.

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[67] Tr. 657, 783.

[68] *Id.*, 657-658.

> Q. Did you ask Representative Fred Banks if he had any specific suggestions for you with respect to the drawing of the House plan?
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> A. I approached Mr. Banks and I asked him, I believe, asked him why he was not giving any input into the plan and suggested that it might be a good thing to hear some of his objections, or perhaps some things he liked about the plan. [Hofeller, Tr. 178-179]

Chairman Campbell also attempted unsuccessfully to solicit Banks's view.[69]

Dr. Aaron Henry, Co-Chairman of the Mississippi Democratic Party, a prominent black leader and President of the Mississippi NAACP, was also a member of the Governor's staff and by his own declaration had access to the Governor at any time he desired.[70] Henry was aware of the reapportionment efforts from the outset but never discussed the matter with the Governor or availed himself of any opportunity to attend public hearings on the matter, public hearings of which he was fully aware. Henry, a long-time friend of Appellee's counsel, Jerris Leonard and Attorney General Summer, stated his preference that the matter be addressed solely in the federal court, even if the plan offered by the Court was identical to that which could be obtained through the legislature.[71]

Appellant Kirksey, despite his professed awareness and concern, attended none of the public meetings and did not communicate with his representatives in the

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[69] Campbell, Tr. 636.

[70] See p. 10, n. 22 and p. 24, *supra*.

[71] Henry, Tr. 779- 780, 769-772, 802.

legislature any of his self-described expertise in maps and census data, especially with regard to certain particularized areas of the State with which he claimed to be intimately familiar. The record reveals no evidence that he offered assistance or guidance to the Committee technical staff, yet he was offered to the Court as a witness on the effect of the statutory plan in all apparently disputed areas.[72]

Appellant Bennie Thompson, Mayor of Bolton, a town in Hinds County, fully informed of the proposed plans through his awareness of the public notice, felt so strongly about the matter that he left the country without making any effort to contact the legislature to suggest how the plans should be drawn.[73]

Defendant-Intervenor Schoby, like Thompson, refused to discuss the matter or otherwise cooperate with the legislature, the Committee, its counsel or its staff.[74]

The only evidence of contact by Frank Parker, Esquire, or anyone affiliated with the Lawyers Committee for Civil Rights Under Law, with the Joint Reapportionment Committee was that of Rims Barber previously discussed. Barber's comments had previously received favorable treatment, as demonstrated above, and Appellants must have had every reason to believe that other similar requests would have been favorably received by the Committee. The absence of input from anyone but Barber brought the following comment from Hofeller:

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[72] Kirksey, Tr. 810-816, 904-906.

[73] Thompson, Tr. 964-968. Thompson, incidentally, was elected to the Hinds County Board of Supervisors in the recent elections.

[74] Schoby, Tr. 984-985.

> Q. Did anyone from the Lawyers Committee on Civil Rights Under Law [sic] make any contact with you with respect to suggestions for these plans?
>
> A. No. As a matter of fact, in one of my discussions with Mr. Barber, I asked him why aren't the people who object to these plans and who are on the other side of law suits speaking out? Why aren't we getting input? And I posed that question. [Hofeller, Tr. 192]

At the same time, the Department of Justice made an affirmative decision to refuse to contribute to, and was totally unresponsive to direct requests from, the Committee regarding suggestions and guidance in drafting the plan.[75]

Acting in reliance on well-publicized hearings and the openness of the process to "flush out" objections or reservations, the legislature settled on its basic configuration in December, 1977, and the remaining effort, as previously noted, was the refining process of moving from E.D.'s to precinct lines.[76] The record fails to show that any of the alternatives preferred by blacks were available and presented to the Committee for its consideration in the ordinary course of the legislative process until after the public hearings had concluded and a basic configuration had been agreed upon.

In the face of this record, the contention by the Appellants that the State failed to adopt "available" al-

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[75] Fortenberry, Tr. 474-475; Campbell, Tr. 671-672; Days Dep. 102; PX 25.

[76] "The basic configuration of the statutory plan was complete in December, 1977, well prior to the submission to the *Connor* Court of various alternative plans, which culminated in the settlement plan adopted by the *Connor* Court on April 13, 1979." Conclusions of Law 22, n. 7.

ternatives is patently absurd. The proper method for presenting "available alternatives" to the legislature was through the forum provided by the open public hearings and through elected representatives; this simply was not done. There is an infinite number of possible configurations in any statewide apportionment scheme. The State had every right to rely on the public hearings, and other direct methods of input, to help the draftsmen focus on areas of concern. The plans the Committee drew fairly reflected the distribution of blacks geographically throughout the State."[11] Examination of the individual areas where Appellants complain of dilution clearly demonstrates that the Committee would have to have been clairvoyant to have anticipated what Appellants have complained of in this lawsuit. These specific areas are discussed in Finding No. 47 of the court below and we discuss them here. We note at the outset that Appellants' objections to these specific areas were discussed at length through witnesses and arguments to the trial court. The court took note in its opinion of these objections and rejected them as insignificant or unfounded.

WARREN COUNTY—HOUSE

Both the settlement plan and the statutory plan divide Warren into three parts and the City of Vicksburg within Warren into two. Appellants simply do not like the manner in which the legislature performed its division and complain that the settlement plan divides so as to provide a BVAP majority district whereas the statutory plan does not. The BVAP majority district created in the settlement plan, however, is below

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[11] Findings of Fact 40-43.

60% black VAP (56.22%) and thus does *not* provide, according to the Appellants' own expert testimony, and the finding of the court below, an opportunity for blacks to elect a candidate of their choice. As the Court noted, "It has been generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a BVAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice." [78] Thus, all that is accomplished for blacks in the settlement plan when compared to the statutory plan in Warren County is to increase the "influence" of black voters in one district while decreasing their influence in two others. The court below thus found the improvement for blacks in Warren in the settlement plan to be "marginal." Since the statutory plan configuration was in draft form at the time of the public hearings and no objection was raised, the whole issue is merely argumentative.[79]

LEFLORE COUNTY—HOUSE

The statutory plan conforms to a suggestion made by an associate of Appellants, Rims Barber, through Representative Buckley, a black member of the Joint Committee, at the public hearings on the statutory plan.[80] Appellants now complain about it. They say they do not like it because the 60% BVAP majority district created for Leflore in the statutory plan is predominantly rural, whereas the 60% BVAP majority district created in the *Connor* Court plan is pre-

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[78] Findings of Fact 36.

[79] See PX 2, PX 6, DX 1, DX 9, DX 11.

[80] Campbell, Tr. 645-646.

dominantly urban. Appellant David Jordan may be dissatisfied with the statutory plan because he was a candidate for the legislature from Leflore County and resides in the Leflore district which under the statutory plan is 37.73% BVAP (the adjacent district in the statutory plan is 64.26% BVAP) whereas, under the *Connor* Court plan, the line is drawn so that he fortuitously finds himself in a 71.72% BVAP district. It is difficult to comprehend how a charge of dilution can be leveled in a county where the BVAP is over 4% greater than that which the Civil Rights Division of the Department of Justice contends permits blacks to elect the candidate of their choice.

HINDS COUNTY—HOUSE

The objection to the statutory plan in this area is that there is no majority black district in the rural part of Hinds County. The *Connor* Court plan provides such a district (59.02%).[81] Again, the Appellants are asking the legislature to be prescient. The Hinds County districts were originally intended to follow as closely as possible existing districts in the 1975 plan which had been approved by the district court.[82] The Committee, however, was dissatisfied with the three BVAP districts which resulted and asked Hofeller to see if he could draw a configuration with more.[83] When Hofeller subsequently tendered a proposal with five BVAP districts in Hinds County, Representative Buckley, a

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[81] There is a typographical error in the Findings of Fact for Hinds County, 47.1(b). It was shown as a 69% BVAP district when it is clearly a 59% BVAP district.

[82] Findings of Fact 47(b); Hofeller, Tr. 395.

[83] Findings, *Id.*; Hofeller, Tr. 206.

black legislator from Hinds objected that it spread the black population too thinly and, in response to Buckley, the plan was modified reducing the number of BVAP districts to four.[84]

Appellant Thompson states at Tr. 963, "If you wanted to draw lines for rural Hinds County [to obtain the Appellants' desired configuration], you would have to draw them north/south." This is opposite to the manner in which the district court had previously drawn the lines in 1975. Thompson stated, at Tr. 964, that if the lines were drawn any other way, you would not get a black majority district in rural Hinds. Thompson, who lives in Bolton, a town in rural Hinds County, stated at Tr. 966-968, "I expressed my concern to [Representative Buckley] that the district as presently constituted severely reduced the effect of the black vote in rural Hinds County." Despite this expression of concern, the problem was not addressed in the Barber Memorandum given to the Committee at the public hearings by Representative Buckley.[85] Buckley, whose views had been incorporated in the final plan for Hinds County,[86] did not express any concern to anyone in the drafting process over this area or make any comment with respect to the drawing of a rural Hinds BVAP district. In fact, the Barber Memorandum states that if the plan for Hinds County was acceptable to Representative Anderson, another black Representative from Hinds County, "the plan can fly." Representative Anderson did not vote against the House bill and there is

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[84] Findins, *id.*; Hofeller, Tr. 206-207.

[85] Tr. 905-906.

[86] Hofeller, Tr. 206.

no evidence that he or any of the other three black legislators from Hinds County suggested to the Committee the formulation of a majority black rural Hinds district prior to the legislature's approval of the basic configuration for Hinds County in December, 1977.

In any event, as the trial court noted, the enhancement sought for black interests by the Defendants and the Defendant-Intervenors is of debatable benefit. The BVAP district that is created in the settlement plan by drawing the north/south lines in rural Hinds is less than the 60% magical figure quoted by Appellants' experts as being required to create a *winnable* black seat in the legislature. In order to create this black rural district, the court also observed that the black influence in adjacent districts would be diluted.

Nonetheless, the acid test of the viability of the statutory plan in this hotly-debated area was sustained by the results of the recent legislative elections. This area elected four black Representatives and two black State Senators to the State legislature. Whether blacks would have faired better than this substantial improvement under the alternative configuration is a matter of sheer speculation.

ADAMS COUNTY—HOUSE

In Adams County, Appellants complain about the inclusion of the predominantly white Morgantown precinct and the exclusion of predominantly black Airport precinct in District 95, the black majority district in this county. The configuration of this particular district in the statutory plan is basically the same as that proposed prior to the public hearings in November, 1977. The *only* suggestion made to the Committee with

respect to this district was contained in the Barber Memorandum given to Representative Buckley. At the time of the public hearings, the district had a black population of 61%. Mr. Barber indicated that "any slight shift would insure a black victory, although it is close the way it is." The Committee responded to this request by increasing the black population percentage to 63.23% and concomitantly increasing the BVAP to 60.23%, a winnable district for black candidates according to the expert testimony and the findings of the court below. The Committee, however, did not realize that it would not satisfy the Appellants unless the Morgantown precinct was eliminated. Having met both the 60%-plus BVAP magic figure requirement urged by the Justice Department and having adopted the changes suggested by those who traditionally attempt to protect black interests, the State could not be expected to have forseen this complaint.

Appellant Schoby is from Adams. His desire with regard to the Morgantown precinct was discussed prior to the public hearings with Appellant Kirksey and Counsel Parker.[87] He had run for office in that precinct and had not done well.[88] Schoby told Mr. Parker that he wanted him "to represent him fairly." He also had contact with Barber who had sent him copies of the draft statutory plans. After reviewing them, Schoby told Barber that he was not satisfied.[89] Schoby wanted Morgantown out and Airport in. Yet, for some unexplained reason, neither Barber nor attorney Parker

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[87] Schoby, Tr. 985.

[88] *Id.*, 986.

[89] *Id.*

chose to communicate Schoby's particular concern with regard to the Morgantown and Airport precincts to the Committee, a failure which can hardly be laid at the doorstep of the Committee.

The change Schoby sought through the settlement plan enhanced his personal chances for election to the legislature (66.45% BVAP as opposed to 60.23% BVAP), as the court below noted, "at the expense of diluting [the] neighboring district[s]."[90] The resulting increase of five percent in the BVAP might be construed to be for no other reason than to guarantee Schoby's safe election to the legislature at the expense of reduced influence for blacks in neighboring districts.

These objections are to be considered *prima facie* evidence of the unsubstantial nature of the issues in this case inasmuch as Mr. Schoby was, in fact, elected to the House from this district despite Appellants' protestations of dilution.

MARSHALL COUNTY—HOUSE

Appellant Kirksey stated the basic complaint of the Defendant-Intervenors below with regard to Marshall:

> Basically we are concerned about the fact that the most successful political activity in this county is centered in SD [Supervisor's District or "Beat"] 4 and that was basically the reason why we were attempting to include as much of that SD in District 5 as possible. [Kirksey, Tr. 864]

The configuration from the *Connor* plan, preferred and urged by Appellants below, splits the City of Holly Springs and by so doing keeps SD 4 intact. The Barber

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[90] Findings of Fact 47(c).

Memorandum indicates a preference for keeping the City of Holly Springs intact. In accordance with the Barber Memorandum, the statutory plan and its predecessors kept the City of Holly Springs intact and by so doing split SD 4.[91] Both alternative plans submitted to the *Connor* Court and approved by Appellants also split SD 4.[92] The Section 5 Court below took cognizance of this fact.[93] Appellants changed their position from that before the *Connor* Court to that before the Section 5 Court. The State cannot be required to have anticipated the apparent change in position. Their now-preferred Marshall County configuration was first called to the attention of the State eight months after the Legislative Committee had decided upon the basic configuration of its plan and four months after the legislature had voted.

Hofeller explains the effect of the late-blooming change in Marshall County sought by the Appellants as follows:

> [T]he change that was made to the statutory plan was to remove this precinct which would go up in a thin line . . . and into Holly Springs and take out the center or the east side of Holly Springs . . . and in exchange add the precinct south of this line to that district. [Hofeller, Tr. 374]

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[91] PX 2; DX 1-11.

[92] *See* D 1-3, Districts 3 and 4, p. 10; D 1-42, Districts 3 and 4; D 4, Districts 3 and 4, p. 1. These alternative plans include one by Intervenors' expert, Dr. Gordon Henderson, a local political scientist (Henderson Plan) and one by the Department of Justice, drawn by John Tanner, a second-year law student and paralegal with the Voting Rights Section (Tanner Plan).

[93] Findings of Fact 47.1(e).

The Court observed that "the sole difference between the plans lies in the allocation of one precinct."[94] This could hardly be categorized as having been racially motivated. "The attempt . . . was to create in Marshall County a logical compact district. That was the *motivation* in the creation of that district [emphasis added]."[95]

The result of the change sought by Appellants was to make an already majority BVAP district six percentage points higher. This six percent increase was gained "at the expense of creating an irregular-shaped district which split the only major city in that district."[96]

HINDS COUNTY—SENATE

As the court below noted, Appellants contend that the statutory plan forms a "seahorse-shaped" district in its Hinds County Senate plan that pairs a portion of the central Jackson black population with the heavily white south Jackson area. They contend that alternative plans proposed to the *Connor* Court are more compact and form black populations of over 60%.[97]

Before the elections in Hinds County, Appellant Kirksey was basically unhappy with Senate District No. 28 in the statutory plan, which has a BVAP majority of 62.93%. Kirksey was unhappy because, even though it is a 60%-plus BVAP majority in an urban area, winnable by the Appellants' own expert's defini-

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[94] *Id.*

[95] Hofeller, Tr. 376.

[96] Findings of Fact 47.1(e); Hofeller Tr. 374.

[97] Findings of Fact 47.2(a).

tion, Kirksey did not believe it to be winnable.[98] The *Connor* Court plan increased the BVAP majority. Not surprisingly, Kirksey lives in the district whose BVAP majority he would like to increase. However, Kirksey ran for the Senate from the district as configured by the legislature in the 1979 elections.[99] He proved himself wrong by winning the election. The court below held that "there is no evidence that this change [Kirksey's proposal] was ever called to the attention of the Committee prior to the enactment of the statutory plan. In any event, the change sought merely increases the black population in an already 60 percent black majority BVAP district, a change of dubious benefit to black representation." [100] That finding remains valid, in view of the fact that not only Appellant Kirksey, but also another black, Representative Douglas Anderson, were elected to the Senate from Hinds County.

HOLMES, HUMPHREYS, MADISON, YAZOO COUNTIES—SENATE

The Appellants complain that Holmes and Humphreys are not joined together in a Senate district.[101] The legislature again would have to have been clairvoyant to anticipate this objection. Neither the Department of Justice nor any of the three plans submitted to the *Connor* Court combines Holmes and Humphreys Counties into one district. The record does not reflect any evidence that this combination of counties was

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[98] Kirksey, Tr. 874.

[99] Findings of Fact 47.1(a), n. 3.

[100] *Id.*, 47.2(a).

[101] Kirksey, Tr. 885-888.

called to the attention of the Committee staff at any time prior to the passage of S.B. 3098.

The percentages surrounding the change and the resulting configurations also make the objection difficult to understand. Set out below are the black population percentages for this area for both the statutory plan and the proposed settlement plan.[102]

Statutory Plan		Settlement Plan	
District	Black Pop.	District	Black Pop.
20	66.33	23	67.11
21	57.38	31	56.03
30	41.01	22	28.87

As this table demonstrates, in order to increase an already 65% black population district by .78%, the Appellants were willing to reduce two other districts by 1.35% and 12.14%, respectively. This is exactly why the experts for the State drew their lines from north-to-south as opposed to the east-to-west alignment urged by the Appellants. In order to gain enough population to accommodate an entire district, Appellants were forced to borrow white population from neighboring white majority population counties. In so doing, the impact of the black population in these districts was lessened far beyond the meager benefit gained in the combination of Holmes and Humphreys.

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[102] These districts account for all counties in question in this area; namely, Holmes, Humphreys, Madison and Yazoo. The difference in district numbers is due to a numbering system in the settlement plan that is different from that in the statutory plan. Finally, we emphasize that the percentages are "Black Population" and not "Back Voting Age Population (BVAP)."

Even more astounding is the fact that the change in the proposed settlement plan results in the *loss* of a 60% BVAP district. District 20 in the statutory plan has a BVAP of 60.37%. District 23 in the proposed settlement plan has a BVAP of 59.86%. This result makes the change even more difficult to understand, especially when the alleged rationale behind it is to remedy perceived dilution in the area.

As the Court below noted, "the record does not reflect any evidence that the requested combination of these counties into a single district was called to the attention of the Committee staff at any time prior to the passage of the statutory plans." [103] The Court also observed, as we have noted, that "the settlement plan would split Madison County across the middle and would dilute the vote in Yazoo County and in north Madison." [104]

Finally, Appellants make much of the fact that Mississippi's first black legislator, Representative Robert Clark, was elected from a district comprised of Holmes and Humphreys Counties. We note that Representative Clark not only voted for the statutory plan, but also sought modifications to the Holmes Senate district which were incorporated in the final Senate bill.[105]

WASHINGTON, ISSAQUENA, SHARKEY COUNTIES—SENATE

Appellants urge this Court to find that black voting strength has been fragmented and cancelled out in the Washington, Issaquena and Sharkey districts config-

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[103] Findings of Fact 27.2(b).

[104] *Id.*

[105] Fortenberry, Tr. 478-479.

ured by the State's statutory plan because (1) the black vote is split between two long narrow districts; and (2) the BVAP in District 23 is too low to allow black voters representation of their choice.

Appellants' own expert, Henderson, testified:

> I think where there are any districts that might look suspect from the grounds of shape, it's probably because of characteristics of the population. Like, *Issaquena,* that's a county with an *enormous land area* and a very *small number of people* living there, and any county that anybody carves out any time that includes *Issaquena* in it may very well have a *strange shape* because there are some other counties around there, *like Sharkey* that *also have odd-looking shapes and are not densely populated. So almost any district that comes into that particular area looks suspicious.* [*Connor* Tr. 105; emphasis added] [This testimony of Henderson's before the *Connor* Court was made part of the record in the case below.]

More importantly, the BVAP as it now stands in the statutory plan (55.74%) would be increased only a mere 1.42% by the settlement plan, yielding a BVAP of 57.16%, a percentage less than the 60% figure that Appellants claim is needed to allow black voters to elect candidates of their choice.

The districts about which they now complain are the same as those contained in the legislative proposal in existence prior to the public hearings. No objection prior to the enactment of the statutory plan was ever voiced on the configurations of these districts. If the settlement plan were allowed to prevail, the adjacent district would become "equally as long and twice as wide." [106]

[106] Fortenberry, Tr. 527.

The Court below, upon taking into consideration all of the Appellants' objections to the State's configuration in this area, found that "the changes in the settlement plan are not significantly different from those created by the statutory plan or ameliorative of the problem of forming compact districts in this area." [107]

At the time of negotiating the settlement plan five months after the legislature had acted, Appellants had the statutory plan before them as a known starting point from which they then devised desired changes. It is important to note that none of the particular districts Appellants complain of now were brought directly to the Committee with a request to include them in the statutory plan or to the drafters of the statutory plan at the time the statutory plans was created. Moreover, Appellants apparently decided not to contend with the political process in deciding what should be done in endeavoring to implement their decisions.

The "settlement plan" which ultimately became, in essence, the *Connor* Court's plan is, in fact, nothing more than a fine tuning of the statutory plan in certain limited areas of the State to bring into better focus the political needs of certain blacks who desire to enhance their own political ambitions.[108] It does not, however, result in enhancement of the political position of blacks in the State as a whole.

In light of the evidence, as summarized above, it is clear that, regardless of who had the burden of going forward with proof on the issue of "purpose," the State introduced ample evidence which, if believed, would support the finding of the court below that the

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[107] Findings of Fact 47.2(c).

[108] Findings of Fact 47, n. 3, and 49; Conclusions of Law 20.

State's agents acted with benign purpose and would refute any evidence of Appellants to the contrary. The trial court heard the testimony and had the statistical evidence, demographic data, and maps before it which were introduced by all parties. There is no basis to conclude that the factual findings derived from that evidence were clearly erroneous. The court's judgment should, therefore, be affirmed.

II. THE TRIAL COURT RULED CORRECTLY IN HOLDING THAT THE STATUTORY PLAN WAS NOT RETROGRESSIVE.

Appellants contend that the district court erred in concluding that S.B. 3098 and H.B. 1491 do not have a racially discriminatory effect. They contend that the statutory plan, when compared with the *Connor* settlement plan, is "retrogressive" in its treatment of black political power and that Section 5 clearance should have been denied. *Beer* v. *United States, supra.* Appellants assert that the district court recognized that the statutory plan was *"retrogressive,"* but held that "slight differences" in the plans were "insignificant" given the preference for legislatively-enacted plans and the broader tolerances which are allowed to legislatures in this area. Continuing, Appellants assert, "This Court has never countenanced the view that there are degrees of retrogression . . . ." [109]

At the outset, we note that the court below *never* recognized the statutory plan as being *retrogressive* when compared with the *Connor* settlement plan. To the contrary, the trial court specifically found that "when compared to the settlement plan adopted by the *Connor* Court on April 13, 1979, the legislative plan is *not*

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[109] Intervenors Jurisdictional Statement at 26.

retrogressive . . . ." [110] The district court did note certain differences between the proposed settlement plan and the statutory plan but determined that these differences were not of such moment as to support a finding that the legislative plan was retrogressive in its treatment of minority voting strength.[111]

One "difference" was that the statutory plan, covering both the Senate and the House, contained three fewer majority BVAP districts than did the court-ordered plan. The court stated that this "difference" of three districts between the settlement plan and the statutory plan involved districts with less than 60% BVAP.[112] The Court then alluded to the fact that the evidence and testimony had demonstrated and "it has been generally conceded" that a district with less than 60% BVAP was not a "winnable" district by blacks and that districts with less than 60% BVAP were simply "influence districts" in which, absent exceptional circumstances, black voters do not have an opportunity to elect a candidate of their choice. The court, in reaching its decision to attach little significance to a difference of three majority BVAP districts below 60%, evidently relied on a concession by the United States during the deposition of the Honorable Drews S. Days, Assistant Attorney General for Civil Rights, to the effect that a difference of three such "influence districts" in a 174-seat legislature does not represent a significant difference under Section 5.[113] More importantly,

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[110] Findings of Fact 49 (emphasis added).

[111] Conclusions of Law 20.

[112] Findings of Fact 36.

[113] *Id.*

the court concluded that both plans, i.e., the statutory plan and the proposed settlement plan, *provided the same number, 16, of BVAP majority districts with a population of 60% or more.* The 60% criteria was advanced by Appellants as the necessary BVAP majority to create a district in which a black could win. The court determined after assessing other criteria, e.g., previous federal court apportionment efforts and demographic distribution of black population in Mississippi, that the statutory plan when compared to the proposed settlement plan was "not retrogressive in overall black voting strength and does not have the effect of abridging or denying the right to vote of any citizen of Mississippi on account of race." [114]

In applying *Beer,* the district court held Mississippi to a higher than necessary standard when it compared the statutory plan with the plan adopted by the *Connor* Court (the Connor settlement plan) on April 13, 1979. We contended below and still contend that the district court should have used the court-ordered *1975* plan for comparison purposes because it was the plan *in existence* at the time the legislature which had been elected under the 1975 plan, drafted the statutory plan. When compared with 1975 plan, the political prospects of blacks are significantly enhanced.[115]

This Court has previously confronted a similar issue. In the *City of Richmond* case, it cited with favor the decision by the Fourth Circuit on a similar settlement agreement, finding that there was no cognizable direct evidence that blacks would have been appreciably bet-

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[114] *Id.*

[115] *Id.*, 44.

ter off under the settlement plan. 422 U.S. at 376, n. 7. Indeed, this Court was foresighted enough to note that the drawing and redrawing of plans through special Masters and compromise negotiations must, sooner than later, come to an end, else the litigatory process would go on indefinitely. Addressing itself to that issue in *Gaffney* v. *Cummings,* the Court overtly wondered:

> What is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population-equality standard. 412 U.S. 735, 750 (1973).

Indeed, it is perfectly obvious that the endless litigation that the Court admonishes against would be all the more prolonged if more allegedly precise plans could be promulgated, produced, and offered in evidence *ex post facto* of the plan *sub judice.* Indeed, as Mr. Justice Douglas and his dissenting brethren noted in *Whitcomb* v. *Chavis,* "One can always fault a lower court by stating theoretical aspects of apportionment plans that may not have been considered." 403 U.S. at 180 (Douglas, Brennan, and Marshall, J.J., concurring). Thus the statistical line must be drawn in a timely fashion and not under a theory of *nunc pro tunc* as Appellants urge.

The present legislature was elected under the *1975 Connor* Court-ordered plan and it was this plan which we contended and still contend established the "voting strength of blacks" from which there can be no retro-

gression per *Beer*. The statutory plan, when measured against this *1975* court-ordered plan, substantially "enhances potential black voting strength." [116] The November, 1979, legislative elections provide the ultimate proof of the validity of that finding. True, the court below rejected our contention in this regard. It accepted the arguments of the Appellants and compared the statutory plan with the *Connor* settlement plan *which was not even in existence when the legislature* acted and *still found no retrogression.*

In addition to misconstruing the trial court's finding that there was no retrogression, Appellants also quibble with the way in which it was reached. They contend that in making its comparison, insufficient consideration was given by the court to socio-economic considerations, population shifts since the 1970 Census, the shape or compactness of districts and that too much consideration was given to the so-called "65% (60%) Rule." We deal with all of these concerns in Part III, *infra.* Suffice it to say in conclusion here, however, that the Court below simply did not find *de minimus* retrogression. It resoundingly and affirmatively concluded that there was *no* retrogression, and thus no prohibited Section 5 "effect" per *Beer.*

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[116] *Id.*, 44.

III. THE DISTRICT COURT DID NOT COMMIT ERROR WITH REGARD TO THE WEIGHT IT ACCORDED EVIDENCE CONCERNING 1970 CENSUS DATA, POLITICAL ACTIVISM OF RURAL VERSUS URBAN BLACKS, AND THE SHAPES OF DISTRICTS, AND APPELLANTS ARE ESTOPPED FROM COMPLAINING ABOUT THE TRIAL COURT'S ADHERENCE TO THE 60% RULE.

The final issue before this Court is whether or not the court below properly took into account certain factors which the Appellants contend make the minimal and apparently insignificant differences in the plans compared by the district court of sufficient significance to constitute retrogression insofar as black voting strength is concerned. Appellants contend that the trial court erred in (a) the failure to allow for population shifts since the 1970 census; (b) the denigration of differences between the statutory and settlement plans that do not result in additional 60% BVAP districts; (c) the failure to consider differences between the political activism of urban and rural blacks; and (d) the failure to find invidiousness from odd-shaped districts.

Appellee contends that the differences between the plans are so unsubstantial that to focus upon these factors in the few areas where the plans are different is to fail to view and compare the plans as a whole. Indeed, "where the only claim is based on disparate effect, then piecemeal review of an apportionment plan may well be misleading." *Connor* v. *Finch,* 431 U.S. at 428 (Blackmun, J., and Burger, C.J., concurring). *See also Washington* v. *Davis,* 426 U.S. at 239, 242, 243, 246; *Richmond* v. *United States,* 422 U.S. at 370-371; and *Gaffney* v. *Cummings,* 412 U.S. at 749.

We referred to those isolated areas of the State where the plans are different in our discussion on "purpose" because of possible relevance on the issue of intent and state of mind. On the issue of "effect," however, we contend that it is inappropriate to look at only pieces of a 174-seat whole. The district court properly "viewing the State as a whole," found that the statutory plan "reflects the geographic distribution of black population within the State." [117] The failure to realize or implement every possible change to the resulting configuration which might enhance a minority's *hypothetical* voting strength does not constitute a dilution of its electoral power within the meaning of Section 5. *Georgia* v. *United States,* 411 U.S. at 535, n. 7. The law does not mandate a system of proportional representation. *Whitcomb* v. *Chavis, supra.*

There simply is no duty to affirmatively gerrymander. A minority is not constitutionally entitled to an apportionment structure designed to *maximize* its political advantage. *Gilbert* v. *Sterrett,* 509 F.2d 1389, 1394 (5th Cir. 1975). In *Richmond,* a claim was made that an annexation which reduced black voting strength from 52% to 42% diluted that strength. There, as a precursor to the rule later laid down in *Beer,* the Court refused to ascribe the statutory meaning of "effect" to the claim of dilution within the circumstances of that case. *Richmond* v. *United States,* 422 U.S. at 372. The converse ruling, this Court reasoned, would impose an obligation on federal courts to guarantee maximum black voting strength regardless of other valid and nondiscriminatory political considerations. Neither the history of the Voting Rights Act nor that of the State

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[117] *Id.,* 40.

of Mississippi warrants such a drastic interpretation of Section 5.[118]

We address ourselves here, nonetheless, to the factors which the Appellants contend the court below failed to appropriately consider when comparing the two negligibly different plans:

(1) *Use of 1970 Census Data.* Appellants contend that the State used 1970 census statistics which they allege "were hopelessly out-of-date and which did not reflect current voting realities." [119] This Court, and by its example other federal courts, has not labored over the efficacy of this national standard. When we were here before, the Court noted that it was "not unusual in cases such as this" for census data to be in dispute. *Connor* v. *Finch,* 431 U.S. at 416, n. 13. Yet in that case both the Court, *id.*, and the concurring Justices, *id.* at 423-424, utilized the very census data of which Appellants here complain. *See also Kirkpatrick* v. *Preisler,* 394 U.S. 526, 528 (1969) and *Gaffney* v. *Cummings,* 412 U.S. at 745, 746 and 754. The State's expert, Dr. Dunn, was uncontradicted in his testimony that 1970 census data was the only known source of uniform data avail-

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[118] Both the Government in its Jurisdictional Statement at 11 and 27, and that of the Intervenors at 2, importune their version of the history of the State. Leaving that argument for another time and place, Appellee merely seeks to confine the Court's attention to the formal record below, importuning on its part the opinion of Mr. Justice Blackmun in a similar case that, "On balance, . . . my judgment is that this is neither the time nor the occasion to be punitive toward Jackson [, Mississippi] for its past constitutional sins of segregation." *Palmer* v. *Thompson,* 403 U.S. at 230 (concurring opinion).

[119] Intervenors Jurisdictional Statement at 4.

able for the entire state.[120] The court below did not commit error in permitting the legislature to rely exclusively on the accuracy of that uniform body of data.

(2) *Use of the 65% Rule in Defining Black Districts.* The court below found that the figure deemed to constitute a "winnable" black district was 65% black population (BPOP) or 60% black voting age population (BVAP). These figures have been cited with some approval by this Court, in what has come to be known as "the 65% Rule." *United Jewish Organizations* v. *Carey,* 430 U.S. at 169 (Brennan, J., concurring). While the origin of this figure in *United Jewish Organizations* is unclear,[121] there was statistical evidence introduced in the court below by the Appellants, over the State's objection, in support of such a rule in this case. The State's objection notwithstanding, the trial court accepted the evidence and applied it as a yardstick in comparing the two plans before it. When using this rule for comparison purposes, the plans compute

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[120] Tr. 547-549; Findings of Fact 15.

[121] Mississippi at no time during or since the trial below conceded the validity of the universal application of this figure, especially given this Court's rulings on the respective uniqueness of reapportionment on a State-by-State basis. *See Reynolds* v. *Sims,* 377 U.S. 533, 578 (1964); *Kirkpatrick* v. *Priesler,* 394 U.S. at 530; *Mahan* v. *Howell,* 410 U.S. 315, 328 (1973). The only documentation for the 65% figure in *United Jewish Organizations* seems to be that of an unnamed Department of Justice spokesman to "[a] staff member of the Legislative Reapportionment Committee [who] testified that in the course of meetings and telephone conversations with Justice Department officials, he 'got the feeling . . . that 65 percent would be probably an approved figure' for the non-white population in the assembly district[s]" which were in the process of formulation. *United Jewish Organizations* v. *Carey,* 430 U.S. at 152.

to be identical in the number of "winnable" black legislative seats, i.e., 16. Further, application of the "Rule" has the effect of rendering a negligible difference (39 as opposed to 36 or a difference of 1.7% for the 174-seat legislature) in BVAP majority districts in the 50%-59% range particularly insignificant since, according to the "Rule," blacks could not reasonably expect to elect a black candidate in such districts.[122]

Mississippi has always had concern about any BVAP percentage, such as 60% or any other (including 50.1%), becoming "magical" insofar as anything above it is "winnable" by blacks and anything below it not. Indeed, the State introduced evidence to show that blacks have been elected to public office in numerous instances in Mississippi where the BVAP was significantly less than 50%.[123] Mississippi cannot say, however, that there was no evidence which would have permitted the court below to adopt the 60% rule as a yardstick in the peculiar circumstances of this case and certainly the Appellants are in no position to complain of the trial court having done so, since they are responsible for having urged the "Rule" upon the trial court below from the outset.[124]

(3) *Urban Versus Rural Blacks.* Appellants emphasize alleged urban-rural divisions in particular counties in the State which allegedly subject erstwhile black majorities to the imagined threat of white bloc voting

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[122] *See* Findings of Fact 49, n. 5.

[123] Bishop Dep., 6-12; Sumner Dep., 6-7; Snyder Dep., 4-8; Poindexter Dep., 13-17; Chew Dep., 6-7.

[124] Loewen, Tr. 1391-1396.

and political apathy and fear among rural blacks in Mississippi.[125] They contend the trial court improperly gave the same weight to a 60% BVAP district comprised of urban and rural blacks as to one of solely urban blacks. This Court has confronted this issue and has found that while such "so-called urban-rural division has been much talked about," any such "[a]ntagonistic bloc voting by the two camps may occur, but it has been overemphasized." *Whitcomb* v. *Chavis,* 403 U.S. at 148, n. 27.

To whatever extent bloc voting may exist on either side of the racial or political line, or to the extent that urban blacks are more politically active than their rural counterparts, it is clear that this Court has never found it to be unconstitutional for a legislature to fail to take these factors into consideration. *Id.* at 155.

(4) *Odd-shaped Districts.* Appellants distort the record in their contention that the statutory plan significantly departs from neutral guidelines and results in excessively odd-shaped districts to the disadvantage of black candidates. As with the concept of "purpose," there was no *a priori* intent by the legislature to create a "systematic and intentional partisan gerrymander," *Wells* v. *Rockefeller,* 394 U.S. 542, 544 (1969), nor is the statutory plan a concatenation of derelict districts resulting in "an unconstitutional 'crazy quilt.'" *Kilgarlin* v. *Hill,* 386 U.S. 120, 121 (1967).

Some of the districts are concededly not aesthetic or purely geometrical. These lines were drawn by rational experts who were endeavoring to balance populations

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[125] Government Jurisdictional Statement at 16, n. 5 and Intervenors Jurisdictional Statement at 16-20.

and realities, such as natural or commonly understood geographic boundaries and communities of interest. *See Gaffney* v. *Cummings,* 412 U.S. at 752, n. 18. To attempt to apply a universally rigid standard of compactness in such a case is to pursue a "will-o'-the-wisp." *Kirkpatrick* v. *Preisler,* 394 U.S. at 538 (Fortas, J., concurring).[126]

The record shows that Appellants do not in fact object to irregularly-shaped districts when they work to their advantage, since they themselves created such districts in order to obtain black percentages acceptable to them. None of the districts in question—and there are only seven sets of them in the House plan—is so highly irregular as to call them into quetsion on account of their shape. Intervenors use hyperbole in describing districts to which they object, but totally failed to submit appropriate proof to counter the testimony of the State's experts that the districts were drawn by using, and indeed were dictated by neutral apportionment techniques. In the cases of both LeFlore and Marshall Counties, for example, the settlement plan districts were less regularly shaped at Intervenors' insistence to achieve their desired racial mix. The Court below considered the Appellants' allegations concerning odd-shaped districts, e.g., Finding of Fact No. 47(c), and found them devoid of merit. *See also White*

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[126] The Court has been much more realistic in this regard, observing, "Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those [plans] made by reapportionment plaintiffs who may have wholy different goals from those embodied in the official plan." *Gaffney* v. *Cummings,* 412 U.S. at 749.

v. *Regester,* 412 U.S. at 764, n. 8. The District Court found that policy of compactness reasonable and it should be affirmed.

IV. THE FINDING OF THE DISTRICT COURT IS NOT REVERSIBLE UNDER THE "CLEARLY ERRONEOUS" STANDARD.

As the foregoing discussion and the record below clearly indicate, the State of Mississippi has successfully borne its Section 5 burden down the long and arduous road to declaratory judgment in Washington, D.C. This burden has been successfully carried despite the changed circumstances since the Court's initial views regarding the efficacy of this judicial alternative.[127] This achievement was both massive and expen-

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[127] In the earlier days of this kind of litigation, this Court was able with confidence to state simply that "the area affected can always go into court," *South Carolina* v. *Katzenbach,* 383 U.S. at 333, and later found that "[i]f a State finds the Attorney General's delays unreasonable . . . the State 'may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.' *Allen* v. *State Board of Elections,* 393 U.S. [544,] 549 [(1969)] . . . ." *Georgia* v. *United States,* 411 U.S. at 541, n. 13. At that time, this Court was able to make such benign recommendations in view of the number of plans failing to receive pre-clearance in the Voting Rights Section of the Department of Justice. During that period, rejections by the Attorney General's office of state and local voting changes numbered only one in about 250. *See Allen* v. *State Board of Elections,* 393 U.S. at 549, n. 5 and 556, n. 22. Since then, of course, either the standards of the Voting Rights Section or the stringency of their interpretation has increased geometrically. Cf. the *amicus* brief of the State of Mississippi in *City of Rome, et al.* v. *United States, et al.,* No. 78-1840 at 14-25, indicating that at the current rate of objection, about 180 plans a year are being rescinded. This trend has the dual effects of increasing the burden on smaller jurisdictions and of clogging the federal court system.

sive and earned the unanimous approbation of the statutory three-judge Federal District Court below.[128]

When all was said and done at the trial, the sole determinations to be made in this case were those of fact. "As we have often indicated, questions of constitutional power frequently turn in the last analysis on questions of fact." *Oregon* v. *Mitchell,* 400 U.S. at 247 (Douglas, J., dissenting). Here the well-respected rule on findings by the trial court falls into place: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a). This "hornbook law . . . [of] deference," *Washington* v. *Davis,* 426 U.S. at 260 (Brennan and Marshall, J.J., dissenting), is directly applicable to the facts and to the absence of reversible error in this case.[129] The record in the present cause is

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[128] Similarly, whereas this Court could once simply acknowledge the fact that "[r]equiring that declaratory judgment actions be brought in the District of Columbia places a burden on the plaintiff," *Allen* v. *State Board of Elections,* 393 U.S. at 559, it is likewise no longer equitable simply to seek to balance that burden with the *nudum dictum* that "the State has sufficient resources to prosecute the actions easily in the Nation's Capital." *Id.*

[129] Cf. the dissents of Justices Brennan, Douglas and Marshall in *Richmond* v. *United States,* 422 U.S. at 385 and the dissenting opinion of the same three Justices in *Mahan* v. *Howell,* 410 U.S. at 345, on this same point. Thus, "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any stated facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Company of New York* v. *Brownell,* 294 U.S. 580, 584 (1934). Likewise, "[c]ourts . . . will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.'" *Oregon* v. *Mitchell,* 400 U.S. at 248 (Douglas, J., dissenting) (citations omitted).

similar to that in *Wright* v. *Rockefeller,* where the Court held that, "It is plain to us that the District Court was not compelled to find that these districts were the product of a State contrivance to discriminate against colored . . . voters." 376 U.S. at 57. Thus the Court has ample grounds to repeat its conclusion in *Washington* v. *Davis,* that "[t]he District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it . . . ." 426 U.S. at 252.[130] As Mr. Justice Douglas observed, "One can always fault the lower court by stating theoretical aspects of apportionment plans that may not have been considered [in the proceedings below]." *Whitcomb* v. *Chavis,* 403 U.S. at 181 (concurring in part and dissenting in part).

This Court has spoken of the "endless litigation," *Whitcomb* v. *Chavis,* 403 U.S. at 156, engendered by State reapportionment cases, and has referred to this litigation *sub nom.* in particular as a "painfully protracted process" which "has occupied the attention of the federal courts for 12 years." *Connor* v. *Finch,* 431 U.S. at 410. With the decision by the District Court below, that long process has come to a statutory and constitutional end and "the citizens of Mississippi at long last . . . [have] elect[ed] a legislature that properly represents them [all]." *Id.* at 426.

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[130] Even were it otherwise, reversal or remand should be based on "record facts, not suppositions," *United Jewish Organizations* v. *Carey,* 430 U.S. at 183 (Burger, C.J., dissenting), rather than "relying on conjecture . . . . [and] [s]peculations," *Burns* v. *Richardson,* 384 U.S. at 87, as Appellants do here.

CONCLUSION

Therefore the final judgment and decree of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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WILLIAM A. ALLAIN
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Attorneys for Appellee

November 26, 1979

APPENDIX

APPENDIX

MISSISSIPPI
HOUSE OF REPRESENTATIVES

P.O. Box 1018 JACKSON 39205

November 16, 1979

Received: November 19, 1979.

Honorable Jerris Leonard
Leonard, Cohen, Gettings and Sher
Suite 550
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Leonard:

Enclosed is the updated survey of legislative races by candidates in districts which contain 40% or more black voting age population. This revised version of the survey is based on the results of the recent November 6 General Election.

Your attention to this matter will be appreciated.

Sincerely,

/s/ DOUG WEAVER
Douglas M. Weaver
Legislative Counsel
and Draftsman

DMW/sg
enclosure

cc: Honorable T. H. Campbell, III

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
		Henry Boyd, Jr.	B			
5	56.02	Ralph Doxey	W	N		E
		Leroy Jones (I)	B			
6	41.87	Gene Manning	W	N		E
9	63.48	Sonny Tedford	W			
		Jack Tucker	W			
		Clayton Henderson	B		N	E
10	41.74	Harry Bryan	W	N		E
11	46.47	Wes McIngvale	W	N		E
		F. R. "Larry" Martel	W			
26	68.83	Aaron E. Henry	B	N		E
27	46.02	Kenneth Williams	W	N		E
28	62.16	Ed Jackson	W	N		E
		Robert B. Morris (I)	B			
		Mabel W. Anderson (I)	B			
29	40.75	Charlie Capps	W	N		E
30	62.00	Hilliard Lawler	W	N		E
		Kenneth Thomas (I)	B			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
31	54.21	Guy Williams	W	N		E
32	55.75	Will Green Poindexter	W	N		E
		Pete Wood (I)	W			
		Ray Edward Dodd (I)	W			
33	51.47	Jack G. Flautt	W			
		Paul Pennington	W			
		Thomas U. Reynolds	W	N		E
34	64.26	Bunky Huggins	W	N		E
		David Jordan	B			
		Silas McGehee, Jr. (I)	B			
36	50.54	Clarence Pierce	W	N		E
		Robert L. Ball	W			
38	43.75	Lee Coleman	W	N		E
		Jimmy Clark	W			
		Claude Watkins	W			
40	63.68	Stanley Gray	W			
		Tyrone Ellis	B	N		E
		G. Jolly (R)	W	N		E
42	40.10	Thomas McCrary	W	N		E

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
49	59.49	Robert Clark	B	N		E
50	60.23	David Halbrook	W	N		E
		L. Richard Berryhill	W			
		Abraham Gates	B			
51	68.35	Leslie King	B	N		E
		Bessie Given	B			
		Jack L. Taylor (I)	W			
53	55.63	Nick Crawford (R)	W	N		
		Perrin Grisson	W	N		E
		Josh Bogen	W			
		Kathy Starr (I)	W			
54	40.14	H. L. (Sonny) Merideth	W	N		E
55	48.23	C.B. (Buddie) Newman	W	N		E
		Johnny Brewer (I)	W			
56	47.10	Ed Buelow	W	N		E
		Mary Frances Terry (R)	W	N		
		Perry Dillard (I)	B			
58	44.95	T. H. Campbell III	W	N		E

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
59	59.93	Edward Blackmon	B			
		Hermit Jones	W	N		E
		George Nichols (I)	B			
60	52.57	P. L. Hughes	W			
		Donald S. Alford	W	N		E
		Jerry Lee Ainsworth (I)	W			
		David Richardson (I)	W			
		Don Lane (I)	W			
67	70.25	Hillman Frazier	B	runoff	N	E
		Hickman Johnson	B	runoff		
		Bob Woodson	B			
		Nehemiah Flowers, Jr. (R)	B	N		
68	74.53	Jerry Brumfield	B			
		Credell Calhoun	B	N		E
		Frank E. Dennis	W			
		Emma Sanders	B			
		John Rawls (R)	B	N		
		Emmett Nichols, Jr. (I)	B			
		Jody B. Hasten (I)	B			
69	69.70	Fred Banks	B	N		E
		James Meredith	B			
		James R. Johnson (R)	B	N		
		Edward C. Eckman (I)	B			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI HOUSE OF REPRESENTATIVES

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
70	68.78	Horace Buckley	B	N		E
		George Barnes	B			
		Lula Lee Grisham (I)	B			
77	44.18	R. E. Anderson	W	N		E
		Lewis Weese	W			
84	51.41	Charles L. Young	B	N		E
		Rick Fortenberry	W			
87	71.55	Dr. Charles Sheppard	B	N		E
		Jimmy Smith	W			
		Jessie A. Morris (I)	B			
		Roosevelt Yarbrough (I)	B			
95	60.63	Barney Schoby	B	N		E
		Mrs. V. L. Holmes (R)	B	N		
98	57.07	Homer Smith	W			
		David Green	B	N		E
104	52.28	Percy Watson	B	N		E
		Mike McMahan	W			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI SENATE

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
2	48.39	David Fly	W			
		Phil Franks	W			
		Frank W. Houck, Sr.	W			
		William Minor	W	runoff	N	E
		George M. Yarbrough	W	runoff		
		Lucius Edwards (I)	W			
10	46.34	Charles Ray Nix	W	N		E
11	59.17	James E. Molpus	W	N		
		Malcolm Mabry (R)	W	N		E
12	51.04	William B. Alexander	W	N		E
		Thomas Morris (I)	B			
13	56.79	Robert L. Crook	W	N		E
		David Matthews	B			
		O. B. Bennett (R)	W	N		
14	51.29	John J. Fraiser, Jr.	W	N		E
15	44.24	Charles Pittman	W	N		E
		Donald Strider	W			
20	60.37	Bob Montgomery	W	N		E
		Arthur J. Tate (I)	B			
21	51.15	Herman B. DeCell	W	runoff		
		Ollie Mohammed	W	runoff	N	E
		Rufus (Pete) Straughter	B			

Legend:

Democrat—No party designation
Republican—(R)
Independent—(I)
Nominated—N
Elected—E

MISSISSIPPI SENATE

November 7, 1979

District Number	Black VAP%	Candidate	Race	Primary First	Primary Second	General Election
22	44.48	Howard Dyer	W	N		E
23	55.74	J. K. (Buddy) Gresham	W	N		E
		Charles V. McTeer	B			
27	59.84	Douglas Anderson	B	N		E
		M. R. Jennings	B			
		Patricia King (I)	B			
28	62.93	Henry Kirksey	B	runoff	N	E
		H. M. Thompson	B			
		James E. Walters	W	runoff		
		Joe R. Dunbar (I)	W			
		R. L. Humphrey (I)	W			
32	49.27	Allen D. Burton	W			
		Algie Davis	W	runoff	N	E
		Worth Hal Thomas, Sr.	B	runoff		
		Arnold Flowers (I)	W			
37	57.39	Jay Disharoon	W	N		E
		Charles Evers (I)	B			
38	48.28	Robert M. Dearing	W	N		E
		Donald Shupe	W			
		Joe Ming (R)	W	N		

Legend:

Democrat—No party designation
Republican—(R)
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r.g.

Supreme Court, U. S.
FILED
DEC 22 1979
MICHAEL RODAK, JR., CLERK

No. 79-504

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA AND
BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE
UNITED STATES, APPELLANTS

v.

STATE OF MISSISSIPPI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY TO APPELLEE'S MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-504

UNITED STATES OF AMERICA AND
BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE
UNITED STATES, APPELLANTS

v.

STATE OF MISSISSIPPI

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

REPLY TO APPELLEE'S MOTION TO AFFIRM

The purpose of this reply is to correct an error of fact appearing at page 50 of the Appellee's Motion to Affirm. There appellee asserts:

> The [three-judge district court below], in reaching its decision to attach little significance to a difference of three majority BVAP districts below 60%, evidently relied on a concession by the United States during the deposition of the Honorable Drews [*sic*] S. Days, Assistant Attorney General for Civil Rights, to the effect that a difference of three such "influence districts" in a 174-seat legislature does not represent a significant difference under Section 5.

Appellee offers, as authority for this statement, "Findings of Fact 36" (presumably, J.S. App. 13a). Appellee does not cite any page in the deposition of Assistant Attorney General Drew S. Days, III.

The district court did not, in "Findings of Fact 36" or elsewhere, advert to any "concession" by Mr. Days. In one portion of his deposition (Dep. 111-115),[1] Mr. Days was questioned about differences between plans in respect of the number of districts having a black majority in the voting age population (VAP); but Mr. Days did not there—or at any other point in his deposition—make the concession described by appellee.

When asked whether the fact, alone, that one plan had 31 majority black VAP district would make it "better" than a plan with 26, Mr. Days replied: "No, not necessarily. There are other factors that one would have to consider * * *" (Dep. 112). He was then asked (Dep. 114) whether, if all else were equal (*e.g.*, the districts had equal percentages of black voters, participation by black voters was equal, and the districts in both plans were equally compact and contiguous), the difference between 31 and 26 black VAP districts would be "significant enough to suggest a racially discriminatory purpose in a 122 member house?" He replied (Dep. 114-115):

> It's very significant. And that's all I can say. It's something that I think would be very important evidence in determining whether there was any indication of discriminatory purpose or a lack of discriminatory purpose.

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[1]This portion of the Days depositon is reprinted as an Appendix to this Reply.

Mr. Days' statement that a difference of five in the total number of black VAP districts would not "necessarily," standing alone, make one plan better than another does not amount to a concession that such a difference would be insignificant in cases where—as here black voter participation may vary from district to district depending on such factors as the urban or rural character of the population. And his answer that a difference between 31 black majority VAP districts in one plan and 26 in another would be significant evidence of racially discriminatory purpose is inconsistent with the concession regarding retrogression that appellee attributes to him.

CONCLUSION

The questions presented by this case are substantial and probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

DOJ-1979-12

[Page 111]

Q Now, let me hand you Days's exhibit six, and ask you if you can tell by looking at the demographics [Page 112] that are depicted on Days's exhibit six, whether or not the statutory plan reflected on there is abridges the right to vote on account of race?

A No, I cannot.

Q So you have to go to more than just how many districts exist and what percentage of black voters happen to be in those districts.

A Well, I'm saying several things. First, that I'm not prepared to conduct an on-the-spot analysis of your exhibit that I have not seen before.

Q Well, isn't that in the Section 5 submission, Days's exhibit six?

A I have not evaluated everything in the Section 5 submission. That's what I have staff to do.

Q Well, it doesn't make one plan, per se, better than another because one has got 31 black majority voting age population seats and another one has got 26, does it?

A Not necessarily.

Q That fact alone doesn't make one plan better than another in your eyes.

A No, not necessarily. There are other factors that one would have to consider, as I've indicated.

[Page 113]

Q As to why the difference.

A Well, why the difference, and also whether the differences in practical terms are significant. That is,

there might be a change in the number of so-called black voting age population districts, but if one looks behind that and looks at what in fact has gone on in those districts, what the history of those districts has been, what we know about block voting, what we know about registration, those figures could take on an increased or decreased significance.

Q All of the factors being equal in a 122 member legislature, do you believe the difference between 31 and 26 is significant?

A If there are 31 districts that have black voting age majority—

Q (Interposing) Majorities as opposed to 26.

A I would think, standing alone, that that might be an improvement, yes.

Q Thirty-one would be an improvement over 26.

A It's more than 26. Yes.

Q It's an improvement, but is it a significant all the factors being equal, is it a significant factor? Is it significant enough to suggest a racial [Page 114] discriminatory purpose on the part of the drafter?

A All other things being equal?

Q Yes.

A I think that one would have to conclude that by all other things being equal, do you mean that the districts are not carved up and they're compact and contiguous, and there's not wide deviations from one district to another?

Q By all things being equal, I mean that the quality from the black standpoint of the 26 is just as good as the quality from the standpoint of the 31. In other words,

the population is as good, the participation is good, the process is open—

A (Interposing) The lines are as good and so forth.

Q That's right. And all I'm talking about is that the difference between 31 and 26, is that significant enough to suggest a racially discriminatory purpose in a 122 member house?

A It's very significant. And that's all I can say. It's something that I think would be very important evidence in determining whether there was any indication of discriminatory purpose or a lack of [Page 115] discriminatory purpose.

Q Do you think it would be a piece of evidence, however, that would cut towards proving that there was a racially discriminatory purpose? In other words, it would tend to prove that there was a purpose to racially discriminate, as opposed to proving that there wasn't.

A You mean, if the legislature produced a plan that had 31 district voting age block—

Q (Interposing) No, if they produced a plan that had 26 black majority, when there was a possibility, a way they could have drawn it to get 31, do you think that that five seat difference is significant enough to suggest a purpose, you know, an improper purpose under Section 5?

A Standing alone, it is not, but it is a piece of evidence.

Q All right.

A I'm sorry I misunderstood your earlier question.

Q I am not the most precise questioner in the world, and you've done a good job answering me.

A I'm sorry.

see

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